86-1226

No.

Supreme Court, U.S.
FILED
JAN 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN MORRELL & CO.,

Petitioner,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GEORGE A. JOSEPH
(Counsel of Record)
MICHAEL P. FORADAS
CHAIM T. KIFFEL
KATHERINE C. GRADY
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2274

LAWRENCE I. KIPPERMAN
JEAN F. HOLLOWAY
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7471

Of Counsel:
RAYMOND W. GASS
MIGUEL F. UGARTE
JOHN MORRELL & CO.
191 Waukegan Road
Northfield, Illinois 60093

Dated: January 26, 1987

Pandick Midwest, Inc., Chicago • 733-6000

QUESTION PRESENTED

Should this Court overrule *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), because experience has demonstrated that it deprives employers of the protection intended by express no-strike clauses in collective bargaining agreements and thereby undermines the federal policies favoring enforceability of such agreements and arbitration of labor disputes?

PARTIES TO THE PROCEEDING

In addition to those parties named in this Petition, the following officers of the respondent labor organizations were defendants below:

Dennis Foster
James R. Lyons
John Doe and Other Persons Unknown

Pursuant to Rule 28.1 of the Supreme Court Rules, John Morrell & Co. states that it is a wholly owned subsidiary of United Brands Company.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Parties to the Proceeding	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
I. *Boys Markets* Requires Courts to Harmonize the Policies of the Norris-LaGuardia and the Labor Management Relations Acts	8
II. *Buffalo Forge* Undermines *Boys Markets*	10
A. *Buffalo Forge* Subverts the Enforcement of Collective Bargaining Agreements by Allowing Unions to Avoid Express No-Strike Pledges	12
B. *Buffalo Forge* Frustrates Its Stated Objective of Encouraging Arbitration	16
1. *Buffalo Forge* Marks an Extreme Departure from this Court's Policy Favoring Arbitration of Labor Disputes over Industrial Warfare	16
2. *Buffalo Forge* Complicates the Courts' Role and Discourages Employers from Agreeing to Arbitration	18
C. *Buffalo Forge* Contravenes the Congressional Policy of Preserving Concurrent State Court Jurisdiction in Enforcing Collective Bargaining Agreements	22
Conclusion	23

PAGE

Appendix

Decision of the United States Court of Appeals for the Eighth Circuit (Oct. 30, 1986) A-1

Memorandum Opinion and Order of the United States District Court for the District of South Dakota (Aug. 29, 1986) A-11

Order of the United States District Court for the District of South Dakota (Sept. 5, 1986) . A-20

TABLE OF AUTHORITIES

PAGE

CASES

AT & T Technologies, Inc. v. Communications Workers, 106 S. Ct. 1415 (1986) 17

Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) ..... *passim*

Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976) ..... *passim*

Campbell "66" Express, Inc. v. Rundel, 597 F.2d 125 (8th Cir. 1979) 19

Cedar Coal Co. v. United Mine Workers, 560 F.2d 1153 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978) 19

Complete Auto Transit, Inc. v. Reis, 614 F.2d 1110 (6th Cir. 1980), *aff'd on other grounds*, 451 U.S. 401 (1981) 19

Design & Mfg. Corp. v. International Union, UAW, 608 F.2d 767 (7th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980) 19

Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974) 9

Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702 (1982) 7, 9

Local Cartage Ass'n, Inc. v. Highway, City and Air Freight Drivers, 574 F. Supp. 1573 (E.D. Mo. 1983) 19

National Wrecking Co. v. Kumerow, 606 F. Supp. 374 (N.D. Ill. 1985) 19

Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) 8

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 9, 12, 13

PAGE

Transcaribbean Motors Transport, Inc. v. Union de Tronquistas, 553 F. Supp. 362 (D.P.R. 1982) 19

Tudor Fashions Ltd. v. Romney, 634 F. Supp. 297 (S.D.N.Y. 1986) 19

United States Steel Corp. v. NLRB, 711 F.2d 772 (7th Cir. 1983) 11

United Steelworkers v. Warrior Gulf Navigation Co., 363 U.S. 574 (1960) 17

Waller Bros. Stone Co. v. United Steelworkers, 620 F.2d 132 (6th Cir. 1980) 19

William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12 (1974) 22

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1441(b) 4

29 U.S.C. § 104 ..... 2, 11

29 U.S.C. § 113(c) 11

29 U.S.C. § 185 2

OTHER AUTHORITIES

Curtin, Buffalo Forge *and the Union's No-Strike Commitment: A Management Perspective*, 1977 Labor Law Developments 57 (V. Cameron ed.) 7

Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663 (1973) 21

Gould, *On Labor Injunctions Pending Arbitration: Recasting* Buffalo Forge, 30 Stan. L. Rev. 533 (1978) 7, 13, 14-15

PAGE

Lowden & Flaherty, *Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of* Buffalo Forge, 45 Geo. Wash. L. Rev. 633 (1977) 7, 10, 13, 14, 15, 21, 23

Report of Special Atkinson-Sinclair Committee, A.B.A. Labor Relations Law Section—Proceedings 242 (1963) 10, 13-14

Smith, *The Supreme Court,* Boys Markets *Labor Injunctions, and Sympathy Work Stoppages,* 44 U. Chi. L. Rev. 321 (1977) 7, 10, 11 15, 16, 21, 22

Comment, Boys Markets *Injunctive Relief in the Sympathy Strike Context:* Buffalo Forge *From A Management Perspective,* 17 Santa Clara L. Rev. 665 (1977) 7

Comment, *Labor Law—Availability of Injunctive Relief to Restrain Sympathy Strikes,* 43 Mo. L. Rev. 503 (1978) 7

Note, *Striking A Balance Between The Norris-LaGuardia and The Labor Management Relations Acts: Is It Still Feasible After* Buffalo Forge?, 29 U. Fla. L. Rev. 525 (1977) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN MORRELL & CO.,

Petitioner,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John Morrell & Co. ("Morrell") hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 804 F.2d 457 (8th Cir. 1986) and is reprinted at A-1 of the Appendix. The opinion of the United States District Court for the District of South Dakota granting Morrell's motion for a preliminary injunction is reported at 641 F. Supp. 803 (D.S.D. 1986) and is reprinted at A-11 of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 30, 1986. (A-1) This Petition is being filed on January 26, 1987.

STATUTORY PROVISIONS INVOLVED

This case involves section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, and section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185. Section 4 of the Norris-LaGuardia Act provides in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person ... from ...
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

Section 301(a) of the Labor Management Relations Act provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner Morrell is a corporation engaged in meat processing and packing. Its plant in Sioux Falls, South Dakota is one of the nation's largest single meat packing

facilities and employs approximately 3000 workers, making Morrell the largest private employer in the state. Morrell hourly workers are represented by respondent labor unions, Local 304A of the United Food and Commercial Workers Union ("Local 304A") and the UFCW International Union, AFL-CIO and CLC (the "International"). Morrell and the unions are parties to a collective bargaining agreement covering the Sioux Falls plant dated November 20, 1985 (the "Agreement"). Morrell also has a plant located in Arkansas City, Kansas, whose workers are covered by a different collective bargaining agreement. Arkansas City workers are represented by the International and UFCW Local 340, another local bargaining unit.

On July 1, 1986, the collective bargaining agreement covering Local 340 workers at the Arkansas City facility expired, and Local 340 officials called a strike. About one month later, while the Arkansas City strike continued, Local 304A officers held a general membership meeting of the Sioux Falls workers. (Tr. 5)[1] A few hours after the meeting, early on August 4, 1986, members of Sioux Falls Local 304A struck the Sioux Falls plant when pickets from Arkansas City Local 340 appeared. (Tr. 15)

Morrell immediately filed suit in South Dakota state court seeking a temporary restraining order and damages. Morrell claimed that the strike was in violation of the Agreement's no-strike clause, which provides:

> Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between

---

[1] The following abbreviations are used in this Petition: "Tr." (transcript of the preliminary injunction hearing); "Pl. Ex." (Morrell exhibits at the preliminary injunction hearing); "Def. Ex." (union exhibits).

> Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the Union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements. (Def. Ex. A, Art. II, ¶ 5)

Later that day, Local 304A removed the case to the United States District Court for the District of South Dakota pursuant to 28 U.S.C. § 1441(b). After Local 304A made an unconditional offer to return to work, Morrell withdrew its request for a temporary restraining order and permitted the striking workers to return. (Tr. 47-49; Pl. Ex. 9) Full production resumed the following day. Shortly thereafter, on August 8, Local 304A filed a class grievance claiming that Morrell had improperly disciplined workers who took part in the August 4 strike because the Agreement did not bar "sympathy strikes" in support of other unions. (Tr. 30-31; Def. Ex. B)

Despite its earlier unconditional offer to return to work, Local 304A again struck the Sioux Falls plant on August 15 when Local 340 pickets reappeared. (Tr. 21, 49) That morning the district court granted Morrell's request for a temporary restraining order to prevent the irreparable harm that such unannounced and sporadic strikes would cause. On August 29, after considering testimony from seven live witnesses, numerous exhibits, and extensive post-hearing submissions, the court preliminarily enjoined members of Local 304A from engaging in further strikes at Sioux Falls pending arbitration of the parties' dispute. (A-19, 641 F. Supp. at 808) It found that the August 15 strike was "a dispute over an arbitrable issue, *i.e.*, [Morrell's] right under the collective bargain-

ing agreement to discipline [its] workers." (A-16, 641 F. Supp. at 806) The court thus rejected the unions' claim that the strike was merely a sympathy strike and concluded that an injunction was proper under the exception to the Norris-LaGuardia Act recognized in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970) for strikes over arbitrable disputes. (A-17, 641 F. Supp. at 807) In light of the "broad no-strike provision" in the parties' Agreement and Morrell's rejection of union proposals during contract negotiations that would have expressly permitted sympathy strikes, the court also ruled that Morrell was likely to prove that both strikes were barred by the no-strike clause. (A-18-19, 641 F. Supp. at 807) Finally, the court concluded that "customer loss, perishable nature of the product, and loss of suppliers, risks [sic] irreparable harm to the goodwill of the company." (A-18, 641 F. Supp. at 807)

The Eighth Circuit reversed. It did not disturb the district court's finding that the work stoppages were causing Morrell irreparable harm. Instead, it held that Morrell's request for a preliminary injunction was barred by section 4 of the Norris-LaGuardia Act as interpreted by *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976). Finding that the strikes at issue were not over arbitrable disputes but instead were mere sympathy strikes, the appeals court ruled that *Buffalo Forge* was controlling.[2] Accordingly, no injunction could issue, even if the Agreement's no-strike clause barred sympathy strikes.

After the Eighth Circuit's decision, and in light of the unions' prior representations, Morrell requested that the unions agree to expedited arbitration to resolve the proper

[2] Morrell does not seek review of the Eighth Circuit's interim ruling that the strikes at issue were sympathy strikes.

scope of the no-strike clause.[3] The unions refused. Instead, they successfully opposed Morrell's petition to compel arbitration on the ground that only Local 304A was entitled to invoke the Agreement's compulsory arbitration provisions. As a result, there has been no final determination—by either an arbitrator or a court—concerning the scope of the Agreement's no-strike clause. Nor has a trial date been set on Morrell's request for damages resulting from the August strikes. In the meantime, the Eighth Circuit's decision has left Morrell powerless to prevent the unions from engaging in further sympathy strikes at any time.

REASONS FOR GRANTING THE WRIT

This Petition raises a single issue: whether district courts are absolutely barred from preliminarily enjoining a strike that violates a contract's express no-strike clause if the strike is a so-called "sympathy strike" and therefore not prompted by an arbitrable dispute. By a five-to-four vote, this Court ruled in *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 410-13 (1976), that the Norris-LaGuardia Act bars injunctions against sympathy strikes, even if the union had agreed not to strike during the

[3] During the preliminary injunction proceedings the unions had repeatedly insisted that they were prepared to arbitrate whether the parties' Agreement barred the supposed sympathy strikes. For example, at the preliminary injunction hearing Local 304A's president testified that the union was "willing to arbitrate the issue whether its sympathy strike violates the 'no strike' clause of the labor contract." (Tr. 30) Defendants made similar statements in their Answer (Answer ¶ 12 and Aff. Defense) and in their brief to the Eighth Circuit (Brief of Appellants at 14, 26). These claims led the Eighth Circuit to conclude that "Local 304A has sought, not avoided, arbitration of the grievance." (A-7, 804 F.2d at 460)

contract term. Justice Powell has criticized that holding as being based on an "aberrant analysis" that is both "artificial and unprincipled" and inconsistent with settled precedent. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 730 (1982) (Powell, J., dissenting). Likewise, former Chief Justice Burger has described *Buffalo Forge* as being premised on "mechanical and contradictory analyses." *Id.* at 729. (Burger, C.J., dissenting).

A decade of experience has proven that *Buffalo Forge* undermines the important national labor policies recognized by this Court only six years previously in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).[4] It creates the intolerable paradox of permitting injunctions against strikes over disputes that are central to the employer-union relationship, but forbidding injunctions where the strike is unrelated to any dispute between the employer and the union. Employers have thus been left without any effective remedy to prevent the

---

[4] *Buffalo Forge*'s flawed analysis and its effect of undermining sound national labor policy have been criticized at length in the scholarly literature. *See, e.g.*, Curtin, Buffalo Forge *and the Union's No-Strike Commitment: A Management Perspective*, 1977 Labor Law Developments 57 (V. Cameron ed.); Gould, *On Labor Injunctions Pending Arbitration: Recasting* Buffalo Forge, 30 Stan. L. Rev. 533 (1978); Lowden & Flaherty, *Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of* Buffalo Forge, 45 Geo. Wash. L. Rev. 633 (1977); Smith, *The Supreme Court,* Boys Markets *Labor Injunctions, and Sympathy Work Stoppages*, 44 U. Chi. L. Rev. 321 (1977); Comment, *Labor Law—Availability of Injunctive Relief To Restrain Sympathy Strikes*, 43 Mo. L. Rev. 503 (1978); Comment, Boys Markets *Injunctive Relief in the Sympathy Strike Context:* Buffalo Forge *From A Management Perspective*, 17 Santa Clara L. Rev. 665 (1977); Note, *Striking A Balance Between The Norris-LaGuardia and The Labor Management Relations Acts: Is It Still Feasible After* Buffalo Forge?, 29 U. Fla. L. Rev. 525 (1977).

irreparable harm that unavoidable and unpredictable work stoppages can cause. Without the right to seek injunctive relief, they are deprived of the benefit of their bargain and, indeed, the union's key contractual promise —industrial peace during the contract term.

The rationale and holding of this Court's prior decisions, particularly *Boys Markets*, cannot support the result reached in *Buffalo Forge*. To the contrary, experience has shown that *Buffalo Forge* has the unintended effect of undermining the strong federal policy favoring specific enforcement of collective bargaining agreements. Furthermore, *Buffalo Forge* has served to frustrate both its stated objectives and the longstanding policy favoring arbitration by undermining the arbitration process itself. Finally, *Buffalo Forge* effectively ousts state courts of jurisdiction over the enforcement of collective bargaining agreements involving sympathy strikes, contrary to the clear Congressional intent in amending the Labor Management Relations Act.

In sum, as Justice Stevens has recognized, a "correct application of the reasoning underlying the landmark decision in *Boys Markets* . . . requires a different result" than this Court reached in *Buffalo Forge*. 428 U.S. at 414 (Stevens, J., dissenting). *Buffalo Forge* should therefore be overruled.

I. *BOYS MARKETS* REQUIRES COURTS TO HARMONIZE THE POLICIES OF THE NORRIS-LAGUARDIA AND THE LABOR MANAGEMENT RELATIONS ACTS.

In *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), this Court held that section 4 of the Norris-LaGuardia Act barred federal courts from enjoining strikes even if they violated no-strike clauses in collective bargaining agreements. Eight years later, however, in

Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), the Court overruled *Sinclair*, concluding that section 301(a) of the Labor Management Relations Act (the "LMRA") "empowers a federal court to enjoin violations of a contractual duty not to strike." *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 381 (1974). *Boys Markets* held that Norris-LaGuardia's proscription of injunctions was not absolute, but yields to the policies of the LMRA and other important Congressional objectives:

> The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration .... [C]onsideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.

398 U.S. at 250.

The Court found extensive support for its conclusion in the history of the labor movement, which resulted in the enactment of Norris-LaGuardia nearly a half century ago. The Act's ban on injunctions was designed to aid and protect early union efforts to organize and to engage in collective bargaining. *Boys Markets*, 398 U.S. at 250-51. *See also Jacksonville*, 457 U.S. at 715-16; *Buffalo Forge*, 428 U.S. at 415-16 (Stevens, J., dissenting). Over time, Congressional emphasis shifted "from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Boys Markets*, 398 U.S. at 251. *See also Gateway Coal*, 414 U.S. at 381. One of the products of this shift was the enactment of section 301(a) of the LMRA, which makes collective bargaining agreements specifically enforceable. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 452-54 (1957).

This history led the Court in *Boys Markets* to conclude that the "Norris-LaGuardia Act was responsive to a situation totally different from that which exists today." 398 U.S. at 250. Thus, " 'the reasons behind the Norris-LaGuardia Act seem scarcely applicable to the situation' " in which an injunction is sought against a strike that violates a collective bargaining agreement. *Id.* at 253 n.22, *quoting* Report of Special Atkinson-Sinclair Committee, A.B.A. Labor Relations Law Section—Proceedings 242 (1963) ("Sinclair Report"). Enforcing a no-strike clause does not run afoul of Norris-LaGuardia because " '[w]here an injunction is used against a strike in breach of contract, the union is not subjected in this fashion to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed.' " *Id. See also* Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 652-56; Smith, *supra* note 4, 44 U. Chi. L. Rev. at 340-42.

In sum, this Court overruled *Sinclair* because it was "a significant departure from [the Court's] otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration and [the Court's] efforts to accommodate and harmonize this policy with those underlying the anti-injunction provisions of the Norris-LaGuardia Act." *Boys Markets*, 398 U.S. at 241 (footnotes omitted). Experience has shown that the same is true of *Buffalo Forge*. It too should be overruled.

II. *BUFFALO FORGE* UNDERMINES *BOYS MARKETS*.

Six years after overruling *Sinclair*, the Court in *Buffalo Forge* took a significant step backward by undermining *Boys Markets* and resurrecting many of *Sinclair*'s

shortcomings. In doing so, the Court drew an artificial and analytically empty distinction between strikes over arbitrable disputes, which it held may be enjoined, and sympathy strikes, which it held may not be enjoined. This distinction creates an unwarranted paradox. Under *Boys Markets*, an employer can enjoin a union from striking over issues crucial to its members' terms and conditions of employment because such disputes are generally arbitrable. Under *Buffalo Forge*, however, the employer cannot prevent a union from shutting down a plant in "sympathy" with other unions over issues that are not only unrelated to its members' terms and conditions of employment, but also "may well be contrary to their own best interests," because such strikes are not over arbitrable disputes. Smith, *supra* note 4, 44 U. Chi. L. Rev. at 342. *See also Buffalo Forge*, 428 U.S. at 429 (Stevens, J., dissenting). This result simply makes no sense. It occurred only because this Court in *Buffalo Forge* misapplied the teachings of its earlier decisions.[5]

[5] Indeed, in creating this distinction the Court literally contradicted itself. Section 4 of the Norris-LaGuardia Act bars injunctions only against strikes "involving or growing out of *any labor dispute*." 29 U.S.C. § 104 (emphasis added). Section 13(c) of the Act defines "labor dispute" as "any controversy concerning terms or conditions of employment." *Id.* § 113(c). To reach its conclusion, *Buffalo Forge* contradicted itself by first holding that a sympathy strike is a "labor dispute" involving a "controversy concerning terms or conditions of employment" (and thus within the prohibition of section 4), and then shifting ground to conclude that the same strike is *not* over terms and conditions of employment (and thus not over an arbitrable issue). These opposite conclusions are plainly irreconcilable. *Cf. United States Steel Corp. v. NLRB*, 711 F.2d 772, 779 (7th Cir. 1983) (commenting on the paradox of unions' claim that no-strike clause bars disputes concerning wages, hours and working conditions directly affecting workers but does not preclude strikes over issues not affecting them directly).

In accommodating the Norris-LaGuardia Act to the LMRA, *Boys Markets* articulated several policies that courts should promote:

1. increasing the binding nature and enforceability of collective bargaining agreements. *Boys Markets*, 398 U.S. at 252-53;
2. encouraging parties to submit to arbitration and avoiding judicial interference with the arbitration process. *Id.* at 242-43; and
3. protecting concurrent state court jurisdiction over enforcement of collective bargaining agreements. *Id.* at 243-47.

When these same factors are taken into account here, it is apparent that *Buffalo Forge*, like *Sinclair* before it, "does not further but rather frustrates" national labor policy. *Boys Markets*, 398 U.S. at 241.

A. *Buffalo Forge* Subverts the Enforcement of Collective Bargaining Agreements by Allowing Unions to Avoid Express No-Strike Pledges.

Long before *Boys Markets*, this Court had recognized the need for specific enforcement of collective bargaining agreements as codified in section 301(a) of the LMRA. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453 (1957), the Court examined the legislative history of section 301(a) and concluded that the statute embodied "a primary concern that unions as well as employees should be bound to collective bargaining contracts." It then expounded on the Congressional objectives underlying the need for enforcement of no-strike promises, quoting at length from the legislative history:

> Congress was also interested in promoting collective bargaining that ended with agreements not to strike. The Senate Report [S. Rep. No. 105, 80th Cong., 1st Sess. (1947)] p. 16 states:
>
> "If unions can break agreements with relative impunity, then such agreements do not tend

> to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace .... Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce."

353 U.S. at 453-54 (footnote omitted).

The policies of encouraging binding collective bargaining agreements and preventing industrial warfare are unwittingly frustrated by *Buffalo Forge*. No-strike clauses are of crucial importance to an employer because they are designed to prevent mid-term interruptions of the employer's business. *Lincoln Mills*, 353 U.S. at 454. Prohibiting federal courts from enjoining violations of such clauses therefore negates "the principal and most expeditious method by which the no-strike obligation can be enforced." *Boys Markets*, 398 U.S. at 248. Thus, "expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures ... is obviously largely undercut if there is no immediate effective remedy ...." *Id.* at 249. *See also* Gould, *supra* note 4, 30 Stan. L. Rev. at 548-49; Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 634.

Damages are a chimerical remedy to the irreparable harm that illegal work stoppages can cause. As the Sinclair Report recognized, "injunctive relief will often be the only effective means by which to remedy the breach of the no-strike pledge and thus effectuate federal labor

policy." Sinclair Report at 242, *quoted in Boys Markets*, 398 U.S. at 249 n.17. Damages are simply "no substitute for an immediate halt to an illegal strike." *Boys Markets*, 398 U.S. at 248. As one commentator has observed, "[t]he practical effect of *Buffalo Forge* is to remove the most effective and least destructive mechanism for enforcing agreements, and to require employers to resort to remedies which may be illusory, insufficient, undesirable, or too harsh." Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 653-54.

These considerations apply with even greater force to sympathy strikes. Such strikes are by their very nature unpredictable. Although an employer may be expected to anticipate that a union may strike over alleged violations of the collective bargaining agreement, it has no way of knowing when a sympathy strike will occur. Pickets from another union (or, as here, another local of the same union) can appear at any time without warning. Even after the sympathy strike ends, the pickets may return, again without notice.

To prevent an employer from seeking judicial enforcement of the union's no-strike promise under such circumstances subjects the employer to unannounced, unavoidable strikes and deprives it of the key union commitment in the collective bargaining agreement. Employers are not only bargaining for the right to seek monetary damages at a later time, but for a truly effective remedy that prevents any business interruptions during the contract term. By forbidding injunctions against sympathy strikes, *Buffalo Forge* thus deprives employers of the benefit of their bargain and subverts the goals of section 301 of the LMRA. *See* Gould, *supra* note 4, 30 Stan. L. Rev. at 546 (*Buffalo Forge* "denies employers who bargained for a no-strike clause intended to cover

sympathy strikes the benefits of fully uninterrupted production"); Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 635 ("[i]n refusing to give full effect to the no-strike agreement, [*Buffalo Forge*] deprives employers of the benefit of their bargain" and "frustrates the purpose of Section 301" of the LMRA); Smith, *supra* note 4, 44 U. Chi. L. Rev. at 341 ("[r]efusing to enforce collective bargaining agreements was not one of the corrective actions envisioned by Congress [in enacting section 301]").

This case illustrates the problem. Historically, the terms and conditions of employment at all Morrell plants were set forth in a single Master Agreement between Morrell and the International. The Master Agreement had a single expiration date for all plants, leaving Morrell vulnerable to a company-wide strike upon expiration of the Master Agreement's term. To ensure continued production of its perishable meat products in the event of a strike at one of its plants, Morrell has negotiated separate contracts with staggered expiration dates. (Tr. 67-70) To further guard against mid-term work stoppages—particularly sympathy strikes in alleged support of workers who might be striking other Morrell facilities—Morrell continued to insist upon contractual no-strike obligations. Indeed, Morrell categorically rejected the unions' attempt during the most recent collective bargaining negotiations to add a clause expressly permitting sympathy strikes. (Tr. 70-71; Pl. Ex. 11) Likewise, Morrell has bargained for a "struck work" provision which requires Sioux Falls workers to handle work transferred from other striking Morrell facilities. (Def. Ex. A, Art. II, ¶ 6)

By barring an injunction to prevent the supposed sympathy strikes, *Buffalo Forge* has gutted the parties' Agreement. Morrell has lost far more than defendants'

no-strike promise. It also has lost the production continuity intended by staggered contract expiration dates and the Agreement's struck work provision. It has been left powerless to resist the irreparable harm that sporadic, unannounced sympathy strikes can cause. This harm was aptly summarized by the district court, whose conclusions in this regard were not disturbed by the Eighth Circuit:

> Testimony was presented to the court as to both the competitive nature of the meat processing industry and the fungible nature of the industry's product. When orders are unable to be filled, customers in a competitive market are forced to go elsewhere. Often this can result in a permanent loss of this customer, especially when the inability to fill orders is repetitive and sporadic. Suppliers are also affected when the company is unable to accept delivery and keep its commitment as to the number of animals needed. All of these, customer loss, perishable nature of the product, and loss of suppliers, risks [sic] irreparable harm to the goodwill of the Company (A-18, 641 F. Supp. at 807)

In sum, *Buffalo Forge* undermines the policy of promoting the enforceability of collective bargaining agreements and denies employers the only meaningful way of holding unions to their no-strike promise. As one commentator has cogently concluded, "[a]llowing one party to breach the agreement with impunity by denying equitable relief to the other creates a strong disincentive to participate in meaningful collective bargaining." Smith, *supra* note 4, 44 U. Chi. L. Rev. at 340.

B. *Buffalo Forge* Frustrates Its Stated Objective of Encouraging Arbitration.

1. *Buffalo Forge* Marks an Extreme Departure from this Court's Policy Favoring Arbitration of Labor Disputes Over Industrial Warfare.

Ever since the *Steelworkers* trilogy, this Court consistently has emphasized the primacy and sanctity of

arbitration as a substitute for industrial strife in resolving labor-management disputes. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). These policies were reaffirmed by this Court as recently as last Term:

> These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.

AT & T Technologies, Inc. v. Communications Workers, 106 S. Ct. 1415, 1418 (1986). A necessary corollary of the preference for arbitration over industrial warfare is that federal courts must be empowered to preserve the peaceful status quo through preliminary injunctions, so that arbitration is truly meaningful. *See Boys Markets*, 398 U.S. at 252-53.

In light of these principles, this Court overruled *Sinclair* because it was "a significant departure from . . . [the Court's] otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration." 398 U.S. at 241. These same considerations should compel this Court to overrule *Buffalo Forge*. As even *Buffalo Forge* recognized, a dispute over the validity of a sympathy strike—no less than a grievance over overtime pay or fringe benefits—is an arbitrable issue. 428 U.S. at 405. In both situations the parties have agreed to privately and peacefully resolve disputes over the proper interpretation of their contract. Just as injunctions issue to preserve the parties' agreement to arbitrate grievances, injunctions are necessary to preserve the parties' agreement to arbitrate the validity of a strike itself. There is simply no reason for the

issuance of an injunction to depend on whether the parties' dispute concerns the validity of a strike as opposed to any other term or condition of employment. *Buffalo Forge*, like *Sinclair* before it, frustrates this Court's consistent emphasis upon arbitration as the primary means to effectuate the national policy of peaceful resolution of labor disputes.

2. *Buffalo Forge* Complicates the Courts' Role and Discourages Employers from Agreeing to Arbitration.

A principal assumption underlying *Buffalo Forge* was that preliminary injunctions against sympathy strikes would undermine arbitration by embroiling courts in "hearings, findings, and judicial interpretations of collective-bargaining contracts." 428 U.S. at 412. Experience has demonstrated, however, that *Buffalo Forge* has actually increased judicial intervention into the parties' private dispute resolution procedures and has decreased the effectiveness of the arbitration procedures themselves.

In an effort to come within *Buffalo Forge*, a union can claim, as here, that the strike at issue is not over arbitrable issues. In so doing, the union can prevent the employer from enforcing the union's no-strike pledge, even though, as here, the scope of the no-strike clause may itself be subject to arbitration. An employer is at a distinct disadvantage when faced with such claims, because unions can erect the veil of "sympathy strike" to obscure the real purpose of the strike. Deciding whether a strike is a sympathy strike, as opposed to a strike over an arbitrable dispute, embroils trial courts and courts of appeals in complicated and intricate hearings concerning the nature of industrial disputes and a union's motives in striking.

These difficulties were not readily apparent in *Buffalo Forge* because the parties had agreed that the underlying dispute was not subject to arbitration. *See Buffalo Forge*, 428 U.S. at 407-09. Subsequent lower court cases make clear, however, that the critical question in preliminary injunction proceedings is whether the strike is over an issue not subject to arbitration.[6] These cases confirm that courts must resolve complex questions of contract interpretation to decide the merits of the dispute.[7] *Buffalo Forge* thus burdens the lower courts with the unenviable task of determining the nature and purpose of a strike on an emergency basis, often without the benefit of discovery. The likelihood of error in such situations is high.

This case presents a perfect example. During the preliminary injunction hearing Morrell produced substantial evidence that the August strikes were precipitated by arbitrable grievances, pointing to several union handbills circulated immediately prior to the work stoppages. Those handbills demonstrated Local 304A's belief that its members' own economic self interest was at stake in the battle between Morrell and Local 340. (See, e.g., Pl. Exs. 1, 3, 5,

---

[6] *See, e.g., Waller Bros. Stone Co. v. United Steelworkers*, 620 F.2d 132, 136-37 (6th Cir. 1980); *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110, 1113-14 (6th Cir. 1980), *aff'd on other grounds*, 451 U.S. 401 (1981); *Design & Mfg. Corp. v. International Union, UAW*, 608 F.2d 767, 769 (7th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980); *Campbell "66" Express, Inc. v. Rundel*, 597 F.2d 125, 128 (8th Cir. 1979); *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1171-72 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *Local Cartage Ass'n, Inc. v. Highway, City and Air Freight Drivers*, 574 F. Supp. 1573, 1577 (E.D. Mo. 1983).

[7] *See, e.g., Tudor Fashions Ltd. v. Romney*, 634 F. Supp. 297, 301 (S.D.N.Y. 1986); *National Wrecking Co. v. Kumerow*, 606 F. Supp. 374, 376 (N.D. Ill. 1985); *Transcaribbean Motors Transport, Inc. v. Union de Tronquistas*, 553 F. Supp. 362, 364-65 (D.P.R. 1982).

10) Morrell also produced evidence that the August 15 strike followed soon after Local 304A had filed its grievance complaining of Morrell's alleged discipline of striking workers, and was therefore over an arbitrable issue.

The district court engaged in a detailed factual investigation and concluded that the August 15 work stoppage was "a dispute over an arbitrable issue, *i.e.*, the right under the collective bargaining agreement to discipline [Sioux Falls] workers." (A-16, 641 F. Supp. at 806) The Eighth Circuit drew the opposite conclusion from the same evidence and vacated the injunction, usurping the trial court's traditional role as fact finder. That the lower courts reached these sharply divergent conclusions over the hotly contested issue of the nature of the August 15 strike amply demonstrates how *Buffalo Forge* has served to complicate the courts' role.

Buffalo Forge also frustrates the arbitration process itself by discouraging employers from agreeing to binding arbitration. As the Court observed in *Boys Markets*, employers are unlikely to agree to arbitration clauses if the unions' no-strike obligations are not specifically enforced: "[a]ny incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated." 398 U.S. at 248. Employers agree to arbitration because they believe they are getting something in return during the give and take of negotiations. Without the assurance that unions can be compelled to honor their no-strike promise, employers will thus be less likely to agree to binding arbitration in the first place. *Id.* This is true whether or not the strike is technically over an arbitrable issue.[8]

---

[8] As Justice Stevens has explained, "in many collective bargaining agreements, the employer has agreed to mandatory arbitration only in exchange for a no-strike clause that extends

(footnote continued on following page)

Finally, because *Buffalo Forge* unconditionally forbids employers from enjoining sympathy strikes, it encourages unions to drag their feet in resolving industrial disputes through arbitration. *See* Curtin, *supra* note 4, 1977 Labor Law Developments at 74. If the union succeeds in convincing a court on a preliminary basis that it has only engaged in a sympathy strike, it may continue to strike, despite its contractual promise not to do so. The union then has a great incentive to delay arbitration over the meaning of the no-strike clause, leaving the employer without any meaningful interim equitable relief and compelling it to continue suffering the damages that such strikes will cause. This result undermines *Buffalo Forge*'s own recognition that, to be effective, arbitration must be prompt. 428 U.S. at 411-12.

Again, this case is illustrative. In opposing Morrell's request for a preliminary injunction, the unions repeatedly represented that they were prepared to begin arbitration immediately to resolve whether the Agreement barred sympathy strikes. After the Eighth Circuit vacated the preliminary injunction, however, the unions—having secured the right to engage in further strikes pending resolution of the scope of the no-strike agreement—have now refused to arbitrate. As a result of the

---

(footnote continued from preceding page)

beyond strikes over arbitrable disputes." *Buffalo Forge*, 428 U.S. at 418-19 (Stevens, J., dissenting), *citing* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 757-60 (1973). *See also* Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 657 (after *Buffalo Forge*, "employers will be less likely to enter into an arbitration agreement if strikes may not be enjoined despite a no-strike agreement"); Smith, *supra* note 4, 44 U. Chi. L. Rev. at 344 (denying pre-arbitration injunctive relief "undermines the employer's incentive to agree to submit disputes to arbitration in exchange for the union's promise not to strike").

unions' tactics, the scope of the no-strike clause in this case is virtually no closer to being resolved now than it was in August, after the initial "sympathy" strike.

In short, rather than constituting a shield to protect the arbitration process, *Buffalo Forge* operates as a sword to subvert it.

C. *Buffalo Forge* Contravenes the Congressional Policy of Preserving Concurrent State Court Jurisdiction in Enforcing Collective Bargaining Agreements.

Denying specific performance of a union's promise not to strike also undermines the federalism concern, codified in section 301(a) of the LMRA, that state courts continue to exercise concurrent jurisdiction with federal courts in enforcing collective bargaining agreements. As this Court has previously explained, section 4 of the Norris-LaGuardia Act limits only *federal* jurisdiction. It in no way prohibits state courts from enjoining strikes barred by a no-strike clause. *See William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 20 (1974). Thus, in enacting the amendments to the Labor Management Relations Act in 1947, Congress "intended *not* to disturb the pre-existing jurisdiction of the state courts over suits for violations of collective-bargaining agreements." *Boys Markets*, 398 U.S. at 243 (emphasis in original).

Buffalo Forge has effectively dispossessed state courts of their right to enforce collective bargaining agreements by enjoining illegal sympathy strikes. *See* Smith, *supra* note 4, 44 U. Chi. L. Rev. at 343; Lowden & Flaherty, *supra* note 4, 45 Geo. Wash. L. Rev. at 665-66. Unions will invariably invoke federal question jurisdiction to remove disputes that arguably involve sympathy strikes to federal court, thereby gaining the immunity from injunction provided by *Buffalo Forge*.

Indeed, that is precisely what happened here. Morrell initially sued in South Dakota state court, but the unions

removed and ultimately avoided an injunction under *Buffalo Forge*. As the Court explained in *Boys Markets*, this practice "oust[s] state courts of jurisdiction in § 301(a) suits where injunctive relief is sought for breach of a no-strike obligation." 398 U.S. at 244-45. Congress plainly did not intend "the removal mechanism to effect a wholesale dislocation in the allocation of judicial business between the state and federal courts." *Id.* at 247.

Section 301(a), which was enacted to provide additional remedies for breach of collective bargaining agreements, should not be made the vehicle for depriving an employer of its only meaningful way to enforce a union's collective bargaining promise.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue for the purpose of overruling *Buffalo Forge*.

Respectfully submitted,

GEORGE A. JOSEPH
(Counsel of Record)
MICHAEL P. FORADAS
CHAIM T. KIFFEL
KATHERINE C. GRADY
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2274

LAWRENCE I. KIPPERMAN
JEAN F. HOLLOWAY
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7471

Of Counsel:
RAYMOND W. GASS
MIGUEL F. UGARTE
JOHN MORRELL & CO.
191 Waukegan Road
Northfield, Illinois 60093

Dated: January 26, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 86-5364

JOHN MORRELL & COMPANY,
Appellee,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,
Appellants.

DENNIS FOSTER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT OF DEFENDANT LOCAL 304A; JAMES R. LYONS, INDIVIDUALLY AND IN HIS CAPACITY AS BUSINESS REPRESENTATIVE AND CORRESPONDING SECRETARY OF DEFENDANT LOCAL 304A; JOHN DOE AND OTHER PERSONS UNKNOWN.

Appeal from the United States District Court for the District of South Dakota.

Submitted: October 17, 1986
Filed: October 30, 1986

Before LAY, Chief Judge, FAGG and BOWMAN *Circuit Judges.*

PER CURIAM.

Local Union 304A of the United Food and Commercial Workers, AFL-CIO (Local 304A) appeals the district court's[1] grant of John Morrell & Company's motion for a preliminary injunction. We reverse.

[1] The Honorable Fred J. Nichol, United States Senior District Judge for the District of South Dakota, presiding.

John Morrell & Co. (Morrell) is a meat processing business with facilities in Sioux Falls, South Dakota and Arkansas City, Kansas (Ark City). Local 304A, an affiliate of the United Food and Commercial Workers International Union, AFL-CIO and CLC, represents employees at the Sioux Falls plant and negotiates collective bargaining agreements with Morrell on behalf of those employees. Local 340, a different local of the same international, represents and negotiates with Morrell on behalf of employees at the Ark City facility. Neither local is a party to the other local's contract with Morrell.

When Local 340's contract with Morrell expired on July 1, 1986, its members struck at the Ark City plant to exert pressure on Morrell to negotiate a new collective bargaining agreement. On two separate occasions, August 4 and August 15, 1986, members of Local 340 also set up picket lines at the Sioux Falls facility. Local 340's business agent testified on cross-examination at the hearing on the preliminary injunction that Local 340's expectation was that if the Sioux Falls employees honored the picket lines, more pressure would be exerted on Morrell to negotiate favorably with the Ark City employees. On both dates, all but one to two percent of the Sioux Falls employees represented by Local 304A refused to cross Local 340's picket lines. While it appears that some officers of Local 304A spoke with Local 340 picketers, no evidence in the record indicates that any member of Local 304A carried picket signs or placards or engaged in any strike activity other than refusing to cross the picket line. The president of Local 304A testified before the district court that his intent as a member of Local 304A in refusing to cross Local 340's picket line was to show support for Local 340 in its contract negotiations with Morrell, and that there was no underlying dispute between Local 304A and Morrell.

Anticipating that Local 304A might take action in support of the Ark City employees, Morrell informed Local 304A by letter on July 30, 1986, that it believed that the no-strike clause[2] in their collective bargaining agreement prohibited Local 304A from honoring a picket line set up in Sioux Falls by Local 340. In that letter, Morrell stated that any Sioux Falls employees who participated in such a strike were subject to termination. On August 4, 1986, the first date Local 304A members refused to cross Local 340's picket line, Morrell sought a temporary restraining order, preliminary injunction, and permanent injunction. That same day, before the issues could be addressed by the district court, Local 340 dismantled its picket line and Local 304A made an unconditional offer to return to work.[3] Although the Sioux Falls employees did return to work on the evening of August 4, Morrell took disciplinary action against the strike participants by noting each employee's absence on August 4 as "unexcused" in its files. In protest of Morrell's action, Local 304A filed a class grievance.

---

[2] The no-strike clause reads:

> Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.

Article II § 5, Agreement Between John Morrell & Co. and Local 304A and the International Union of the United Food and Commercial Workers, Nov. 20, 1985—Nov. 19, 1988.

[3] Local 304A's unconditional offer to return to work stated: "The picket line is coming down. We're making an unconditional offer to return to work on behalf of the membership of Local 304A, with the regular shifts, starting with tonight."

On August 15, when the members of Local 304A refused to cross a new picket line established by Local 340, Morrell applied for and obtained a temporary restraining order. After an evidentiary hearing on August 18, 1986, at which Local 304A moved the district court to vacate the TRO and deny Morrell further injunctive relief, the district court granted Morrell a preliminary injunction which prohibited Local 304A and all persons acting in concert with its members from participating in work stoppages at the Sioux Falls plant. The district court ordered that the issues raised in the court's memorandum opinion and order be submitted to arbitration. In its memorandum opinion, the district court found that the August 4 strike was a sympathy strike which could not properly be enjoined. However, relying on the fact that the second work stoppage occurred after the union had submitted an unconditional offer to return and had filed the class grievance, it concluded that the August 15 action was only in the guise of a sympathy strike and had been transformed into a dispute over underlying arbitrable issues. Because it had concluded that the second strike was over an arbitrable grievance covered by the terms of the parties' collective bargaining agreement, the district court determined that the second strike could be enjoined. After unsuccessfully seeking a stay from the district court pending appeal, Local 304A petitioned this court for an expedited hearing, which we granted.

To determine whether the district court properly enjoined Local 304A's strike activities, we start with the congressional limitation on a federal court's jurisdiction to issue orders enjoining a strike, set our in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104.[4] A narrow ex-

[4] Section 4 of the Norris-LaGuardia Act provides, in pertinent part:

No court of the United States shall have jurisdiction to issue

Footnote continued on following page.

ception to this statutory prohibition from enjoining strikes was established by the Supreme Court in *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970), which allows an injunction to issue only if the strike is over a dispute which under the parties' collective bargaining agreement should be submitted to arbitration. In two subsequent cases, the Supreme Court emphasized the narrowness of the *Boys Markets* exception and held that a *Boys Markets* injunction may not issue unless the strike has been triggered by an arbitrable dispute. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702 (1982), and *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976) (both cited in *Purex Corp. v. Automotive, etc. Employees Union*, 705 F.2d 274, 276 (8th Cir. 1983)).

In gauging the intended scope of the *Boys Markets* exception to the anti-injunction rule, this court has observed that

> [t]he Supreme Court's opinions in *Buffalo Forge* and *Jacksonville Bulk Terminals* analyze the *Boys Markets* exception as a means for effectuating the national policy favoring agreements to arbitrate, and not as an enforcement mechanism for no-strike clauses. Both *Buffalo Forge* and *Jacksonville Bulk Terminals* distinguish between strikes where the underlying dispute is arbitrable and those where the legality of the strike itself is arbitrable. Only in the former category are strikes subject to injunction, because

---

Footnote continued from preceding page.

> any restraining order or temporary or permanent injuction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute * * * from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104.

only there does the strike represent a breach of the Union's agreement to arbitrate.

Purex Corp., 705 F.2d at 276; *see also Peabody Coal Co. v. International Union, UMWA*, 430 F. Supp. 205, 207 (E.D. Mo. 1977). Moreover, even in *Boys Markets*, the Supreme Court cautioned that its views should not be construed to find "that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." *Boys Markets*, 398 U.S. at 253-54.

Applied to the facts of this case, the anti-injuction principles just outlined require that the district court find that Local 304A's strike activity represented a union response to a dispute over a grievance which the union was contractually bound to arbitrate. *See National Rejectors Indus. v. United Steelworkers*, 562 F.2d 1069, 1075 (8th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978), (citing *Buffalo Forge*, 428 U.S. at 409). In the findings of fact contained in its order granting a preliminary injuction, the district court found that "[t]he [August 4, 1986] picket line was honored to show support for Local 340 workers" and that on August 15, 1986 "the workers again refused to cross a second picket line established at the Sioux Falls plant by Local 340." These findings, which are supported by the record, identify the underlying cause of strike activity on both dates to be Local 304A's response to the appearance of Local 340 pickets, motivated by a desire to show support for the Ark City employees in Local 340's contract negotiations with Morrell. To the extent that the district court found that the first strike was a sympathy strike, that the parties' no-strike clause did not prohibit sympathy strikes, and that the August 4 strike could not be enjoined by a federal court, we agree with the district court's analysis. However, although the district court made no finding of fact that either strike at the Sioux Falls plant

was motivated by a labor dispute between Local 304A and Morrell, and did not find that members of Local 304A struck at any time other than the two separate dates that Local 340 pickets appeared in Sioux Falls, the district court concluded as a matter of law that Local 304A's refusal on August 15 to cross Local 340's picket line was precipitated by the grievance filed by Local 304A to protest Morrell's discipline of employees who participated in the August 4 strike. The district court concluded that the second strike therefore fell within the *Boys Markets* exception and could be enjoined. For this conclusion, we can find no support in the record, in the district court's findings of fact, or in the applicable case law.

No evidence indicates that Local 304A was attempting to circumvent its contracted-for obligation to process this dispute through normal arbitration channels by striking. To the contrary, the record shows that Local 304A has sought, not avoided, arbitration of the grievance. Moreover, arbitration of the grievance will not resolve what the district court itself found to underlie Local 304A's strike actions—the desire to show support for Local 340. The evidence does indicate that a work stoppage occurred at the Sioux Falls plant on August 15 only when Local 340 pickets reappeared. The chronology of events on which the district court relied cannot alone support an inference that the August 15 strike was over Morrell's disciplinary acts, especially when the evidence at the hearing uniformly supports a conclusion that the August 15 strike, like the August 4 strike, was solely a sympathy strike in support of Local 340. Nothing in the record or in the district court's findings supports an inference of a cause and effect relationship between the grievance and the August 15 strike.

Further, the district court's reliance on *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110 (6th Cir. 1980), *aff'd on diff. grounds*, 451 U.S. 401 (1981), to conclude that the August 15 work stoppage was transformed into a strike over an arbitrable grievance is misplaced. In *Complete Auto*, the evidence in the record indicated that although the original non-arbitrable event causing the strike was resolved, the strike continued over an admittedly arbitrable dispute. *Id.* at 1111. The Sixth Circuit held that in determining the cause of a strike for purposes of issuing an injunction, a district court should consider what the strike was "over" at the time of its decision rather than what "precipitated" the strike in the first place. *Id.* at 1114.

Here, the event causing the August 4 sympathy strike, Local 340's stalled contract negotiations with Morrell, remained unresolved as of August 15. The fact that Local 304A filed a grievance indicates that Local 304A was consciously invoking arbitration machinery to resolve the dispute. The Sixth Circuit's reasoning in *Complete Auto* does not teach that whenever a grievance is pending which arose out of a strike that could not be enjoined, a union cannot subsequently engage in another protected strike. We know of no court which has relied on *Complete Auto's* "transformation" analysis to find an injunction of a strike warranted. Nor does any case of which this court is aware, including *Complete Auto*, hold that because a grievance is pending a subsequent strike is presumptively undertaken in response to the dispute underlying that grievance. Moreover, the Sixth Circuit itself has apparently questioned the continuing vitality of *Complete Auto's* transformation theory. Although *Complete Auto* was affirmed on other grounds on appeal, in a subsequent case discussing the prerequisites to issuance of an injunction pending arbitration, that court noted that "the

Supreme Court has not addressed the validity of the transformation analysis." *International Union United Automobile, etc. Workers v. Lester Eng'g Co.*, 718 F.2d 818, 824 n.1 (6th Cir. 1983) (citing *Jacksonville Bulk Terminals*, 457 U.S. at 723 n.22)). *Complete Auto* lends no support to the district court's conclusion that the August 15 strike was not a sympathy strike to the same extent as was the strike on August 4.[5]

The uncontradicted evidence in the record indicates that although Local 304A's filed grievance resulted from Morrell's retaliation for Local 304A's participating in the

---

[5] In concluding that the August 15 work stoppage was in the "guise" of a sympathy strike, the district court emphasized that Local 304A had made an unconditional offer to return to work which the district court "accepted." Citing no authority for its conclusions, the district court interpreted the "offer" as becoming part of the collective bargaining agreement, presumably concluding that in making the offer Local 304A waived its right to engage in any future strike of any kind. We believe that this interpretation of the events of August, 1986 overlooks the function of unconditional offers in labor relations as a means to conclude a strike and reinstate strikers to their original jobs without the union members being displaced by replacement workers. *See, e.g., NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967); *C.H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 985 (5th Cir.), *cert. denied*, 400 U.S. 942 (1970). *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 103 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). The right of employees to engage in sympathy strikes in support of another union is protected under provisions of the National Labor Relations Act, *see* 29 U.S.C. §§ 157, 163, although employees may waive this right if the waiver is clear and unmistakable. *Amcar Division, ACF Indus. Inc. v. NLRB*, 641 F.2d 561, 566 (8th Cir. 1981). However, we do not believe that it is proper to construe this unconditional offer to return to work as a new promise, incorporated in the collective bargaining agreement, in which Local 304A waived its right to engage in further lawful strike activity.

August 4 strike, the grievance did not precipitate Local 304A's participation in the August 15 strike. Neither the record nor the district court's own findings support the district court's conclusion that the August 15 strike was not a sympathy strike but had been transformed by virtue of the filed grievance into a strike over an arbitrable matter. Because there is no evidence in the record to support the district court's finding that the August 15 strike was over an arbitrable grievance, the strike does not fall within the narrow *Boys Markets* exception to the anti-injunction rule. Under section 4 of the Norris-LaGuardia Act, the district court was without jurisdiction to issue a preliminary injunction.[6]

The decision of the district court is reversed,[7] and the district court is directed to vacate its order granting the preliminary injunction.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[To be published.]

---

[6] Although Morrell argues that our decision in *Campbell "66" Express, Inc. v. Rundel*, 597 F.2d 125 (8th Cir. 1979), is controlling here, we do not believe that case supports a different result. In *Campbell*, the district court found that the facts in the record demonstrated that the union had attempted to circumvent the result of a binding grievance proceeding by picketing the company. The district court made findings, supported by the record, that the purpose of the picketing was not primarily informational, as the union claimed, but was designed to get an employee rehired whose termination had been upheld by an arbitrator. Here, neither the record evidence nor the district court's findings support a conclusion that Local 304A's stated reasons for striking were pretextual.

[7] Morrell has also filed a complaint seeking money damages for harm allegedly incurred through Local 304A's activities. The merits of Morrell's request for damages has never been addressed, and we do not decide those issues here.

Filed August 29, 1986
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT
District of South Dakota
Southern Division

JOHN MORRELL & CO.,
Plaintiff,

vs.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC; DENNIS FOSTER, Individually and in his capacity as president of Defendant Local 304A; JAMES R. LYONS, Individually and in his capacity as Business Representative and Corresponding Secretary of Defendant Local 304A; and JOHN DOE AND OTHER PERSONS UNKNOWN,
Defendants.

CIV86-4135

Memorandum Opinion and Order

The plaintiff, John Morrell & Co. (Morrell), is a corporation engaged in the meat processing business, an industry affecting commerce within the meaning of the Labor-Management Relations Act section 301(a), 29 U.S.C. section 185(a), and the National Labor Relations Act (NLRA) section 2, as amended, 29 U.S.C. section 152. The defendants, Local 304A of the United Food and Commercial Workers Union (UFCW), AFL-CIO (Local 304A), and UFCW International Union, AFL-CIO (International), are unincorporated associations and labor organizations within the meaning of the NLRA Section

2(5), 29 U.S.C. section 152(5). Morrell and Local 304A and the International are parties to a collective bargaining agreement with a term from November 20, 1985, through November 19, 1988. The plaintiff brought this action pursuant to section 301 of the Labor-Management Relations Act, 29 U.S.C. section 185, seeking preliminary injunctive relief against further work stoppages by the defendants in violation of this collective bargaining agreement. For the reasons hereinafter stated, the plaintiff's motion for a preliminary injunction is granted conditioned upon the employer submitting both grievances to arbitration. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 254 (1970).

FACTS

The collective bargaining agreement between Morrell and Local 304A and the International contains the following no-strike clause:

> 5. Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.

Mandatory grievance and arbitration provisions are also contained in the agreement and are all specifically referred to in this no-strike clause ("the manner provided in the respective agreements").

Morrell's also has a meat processing facility located in Arkansas City, Kansas (Ark City). This facility's

bargaining representative with Morrell is Local 340 of the UFCW, along with International. Any collective bargaining agreement between Morrell and the Ark City facility is separate and distinct from that between Morrell and Local 304A in Sioux Falls. The labor contract at the Ark City plant expired July 1, 1986, and when negotiations were unsuccessful between Local 340 and Morrell, Local 340 went out on strike. The legality of this strike is not at issue here.

On August 4, 1986, a number of the members of Local 340 set up a picket line in front of the Sioux Falls Morrell plant. With insignificant exception, Local 304A and the employees at the Sioux Falls plant whom Local 304A represent honored this picket line. At this time, Local 304A, as testified to by its president Dennis Foster, had no grievance with the plaintiff. The picket line was honored to show support for Local 340 workers.

Morrell immediately sought a temporary restraining order and injunctive relief to end this work stoppage. Before any court addressed this issue, however, Local 304A, by and through its business representative Jim Lyons, made an unconditional offer to return to work.

On August 8, 1986, Local 304A filed a grievance pursuant to the collective bargaining agreement, claiming a violation of Article II, Section 5, the no-strike provision, of the agreement. The union claimed that the contractual agreement permitted Local 304A members to honor picket lines without being subject to discipline or discharge. This grievance was filed in response to action taken by Morrell against employees who had refused to cross the picket line; the employees' personnel records were noted with an unexcused absence from work on that date.

Despite the unconditional offer to return to work and with the grievance pending, the workers again refused to

cross a second picket line established at the Sioux Falls plant by Local 340 on August 15, 1986. When this second work stoppage occurred, Morrell sought and obtained a Temporary Restraining Order (TRO), issued August 15, 1986, restraining the members of Local 304A from further work stoppages. Local 304A, by and through its president Dennis Foster, again, on August 15, 1986, made an unconditional offer to return to work.

ISSUE

The issue presented to the court was whether injunctive relief could be granted pending arbitration of the dispute between Morrell and Local 304A and the International under *Boys Markets, Inc. v. Retail Clerk's Local 770*, 398 U.S. 235 (1970).

In *Boys Markets*, the Supreme Court determined that an exception to the general anti-injunction rule of the Norris-LaGuardia Act, 29 U.S.C. section 104, is that an injunction could be granted where an employer sought to enforce the union's contractual obligation to arbitrate grievances rather than strike over them. *Boys Markets*, 398 U.S. at 249-253. This narrow exception was further clarified in *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976). In *Buffalo Forge*, the Court held that the *Boys Markets* exception does not apply when "*only* the question whether the strike violates the no-strike pledge, and not the dispute that precipitated the strike, is arbitrable under the parties collective bargaining agreement" *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702, 708-709 (1982).

Buffalo Forge at first blush would appear to be dispositive of the issue before this Court. The factual situ-

ation addressed in *Buffalo Forge* was a pure sympathy strike, wherein members of one union with no dispute with their employer, honored the picket line of a separate bargaining unit who in fact had a dispute with the same employer. *Buffalo Forge*, 398 U.S. at 399-404. Since there was in fact no dispute between the union honoring the picket line and the employer, the sympathy strike was not *over* an arbitrable grievance and thus not subject to the *Boys Markets* exception. *Id.* at 404. The Court did not disagree that the issue of whether the sympathy strike violated the no-strike provision of the collective bargaining agreement was itself arbitrable. *Id.* at 405, 410. However, since there was *no underlying dispute* between the union and employer, no injunctive relief pending arbitration was justified, thus *Boys Markets* did not control the case. *Id.* at 407.

This reasoning of *Buffalo Forge* was reaffirmed in the subsequent case of *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702 (1982). The dispute at issue in *Jacksonville* was whether the refusal by the union, in protest of the Soviet invasion of Afghanistan, to handle cargo bound to or coming from the Soviet Union violated the collective bargaining agreement between the parties. The employer sought injunctive relief pending arbitration of this dispute.

Both *Buffalo Forge* and *Jacksonville* addressed a work stoppage that occurred, not in response to any specific dispute between the union and the employer, but rather, was in response to some other distinct controversy, *i.e.*, another union's strike and the Soviet invasion of Afghanistan. This is similar to what occurred on August 4, 1986, in the case at bar. Local 304A, at that time, had no separate arbitrable dispute with the plaintiff. Local 304A simply honored the picket line established by Local 340 and thus squarely came within the *Buffalo Forge* rationale. Injunctive relief at that point would have been improper.

However, the union *unconditionally* agreed to return to work before the Court could even address the question of injunctive relief. This *unconditional offer* was accepted by the company and became a part of the ongoing collective bargaining agreement. Local 304A, four days later, filed a grievance against Morrell charging that the employer's action in disciplining employees who failed to work on the day of the sympathy strike violated the no-strike provision of the collective bargaining agreement. The union, by filing this grievance, has recognized the arbitrability of this dispute between itself and the plaintiff. Yet one week later, on August 15, Local 304A again participated in a work stoppage under the guise of a "sympathy strike" for Local 340.

It is this subsequent work stoppage, after an unconditional offer to return to work following a grievance submitted by the Union, that distinguishes this case from both *Buffalo Forge* and *Jacksonville*. The original work stoppage, which began as a sympathy strike over a nonarbitrable dispute, has now been transformed into a dispute over an arbitrable issue, *i.e.*, the right under the collective bargaining agreement to discipline these workers. The Sixth Circuit has in fact addressed this "transformation" concept in *Complete Auto Transit, Inc. v. Reis*, 614 F.2d 1110 (6th Cir. 1980), *aff'd on other grounds*, 451 U.S. 401 (1981). The Supreme Court, however, has not addressed the validity of this transformation analysis. *Jacksonville Bulk Terminals*, 457 U.S. at 723 n.22, citing *Complete Auto Transit*, 451 U.S. at 401 n.4.

In *Complete Auto* there was a work stoppage based upon an intra-union dispute. This stoppage was not enjoinable under *Buffalo Forge* because there was no underlying arbitrable dispute between the employer and union. After the intra-union dispute was settled, the

work stoppage continued when a question arose over the amnesty the workers were to be given by the employer. This question of discipline was a dispute between the employer and union and was over the terms of employment and thus arbitrable under the collective bargaining agreement. The Sixth Circuit noted that the focus in determining the propriety of injunctive relief should be on what the strike was *over* at the *time* of the *decision*, not what *precipitated* it in the first place. *Complete Auto*, 614 F.2d at 1110, 1114. This Court agrees.

The situation at bar, as supported by evidence, is such that the second work stoppage occurred after a grievance had been filed concerning the discipline of workers and after an unconditional offer to return to work has been accepted by the employer. Any subsequent stoppage, even if under the guise of sympathy strike, was transformed into a dispute over these underlying arbitrable issues and is enjoinable under the *Boys Markets* exception.[1] And further, resolution of the discipline grievance pending before the arbitrator will in fact resolve both the issue of the validity of a sympathy strike under the terms of the collective bargaining agreement as well as the discipline issue.

In addition to finding that an underlying dispute is arbitrable under the terms of the collective bargaining agreement, the court must also consider whether the ordinary principles of equity warrant the issuance of injunctive relief. *Boys Markets*, 398 U.S. at 254. In order to determine the equity of such relief, the court must

[1] This Court is not unmindful of the Eighth Circuit decision of *Valmac Industries, Inc. v. Food Handlers Local 425*, 519 F.2d 263 (8th Cir. 1975), *cert. granted, vacated and remanded*, 428 U.S. 906 (1976), but feels that the facts in the case at bar are distinguishable from *Valmac* and are much more in line with *Complete Auto*, and accordingly holds with the Sixth Circuit.

consider: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict; (3) the probability of the movant's success on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc).

Testimony was presented to the court as to both the competitive nature of the meat processing industry and the fungible nature of the industry's product. When orders are unable to be filled, customers in a competitive market are forced to go elsewhere. Often this can result in a permanent loss of this customer, especially when the inability to fill orders is repetitive and sporadic. Suppliers are also affected when the company is unable to accept delivery and keep its commitment as to the number of animals needed. All of these, customer loss, perishable nature of the product, and loss of suppliers, risks irreparable harm to the goodwill of the company. *See, Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 592 (8th Cir. 1983).

The balance of harm in the case at bar falls on the side of Morrell. As noted above, the potential loss of goodwill, customers, suppliers, etc., is great. Local 304A and the International have not demonstrated what harm, if any, would result to the union if an injunction, conditioned on submission of the issues to arbitration, is granted. Such an injunction may, in effect, protect the job security of the defendant union members.

There is a broad no-strike provision contained in the current collective bargaining agreement between the parties. There was also evidence as to certain provisions that Local 304A and the International submitted during the negotiations of the present agreement. These proposed provisions specifically allowed the members of Local 304A to honor picket lines established at the Morrell

facility without discipline or discharge. This provision was *not* incorporated into the collective bargaining agreement signed by both parties. Such evidence supports the probability of success on the merits for Morrell on both the issue of discipline and the legality of a sympathy strike.

Lastly, the Court in *Boys Markets* found in favor of allowing injunctive relief when the underlying dispute was present in order to further the congressional policy of favoring peaceful resolution of labor disputes. *Boys Markets*, 398 U.S. at 253. Undoubtedly peaceful resolution of the dispute in question is in the public interest.

Having found that, at the time of this decision, there is in fact an arbitrable dispute between Local 304A and Morrell which precipitated a second work stoppage on August 15, 1986, even though under the guise of another sympathy strike, and finding that the principles of equity favor the granting of injunctive relief,

THEREFORE, IT IS ORDERED:

That the plaintiff's motion for a preliminary injunction is granted, conditioned upon the employer (Morrell) submitting to arbitration. This Memorandum Opinion constitutes the Court's Findings of Fact and Conclusions of Law pursuant to F.R.C.P. 52(a).

Dated this 29th day of August, 1986.

BY THE COURT

/S/ FRED J. NICHOL
Fred J. Nichol
Senior District Judge

ATTEST:

WILLIAM F. CLAYTON,
Clerk
By /S/ KAREN M. TOFT
Deputy

NOTICE OF ENTRY

Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 29th day of August, 1986.

/S/ WILLIAM F. CLAYTON, *Clerk*

Filed September 5, 1986
William F. Clayton, Clerk

UNITED STATES DISTRICT COURT

District of South Dakota

Southern Division

JOHN MORRELL & CO.,

Plaintiff,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC; DENNIS FOSTER, Individually and in his capacity as president of Defendant Local 304A; JAMES R. LYONS, Individually and in his capacity as Business Representative and Corresponding Secretary of Defendant Local 304A; and JOHN DOE AND OTHER PERSONS UNKNOWN,

Defendants.

CIV 86-4135

Preliminary Injunction

PRELIMINARY INJUNCTION

This cause coming to be heard on plaintiff's motion for preliminary injunction and the Court having held an evidentiary hearing and issued a Memorandum Opinion and Order dated August 29, 1986, containing findings of fact and conclusions of law which are incorporated herein by reference:

IT IS HEREBY ORDERED that defendants, their officers, agents, servants, representatives, members and employees and all those in active consort or participation with them, and each of them, are enjoined and must refrain from calling, instigating, directing, encouraging, causing, assisting or participating in a strike, work stoppage, slowdown, picketing or interruption with the operation of plaintiff's Sioux Falls plant in violation of the current Collective Bargaining Agreement in effect between the parties or Defendant Unions' unconditional offer to return to work.

IT IS FURTHER ORDERED that the parties shall submit the issues raised in the Court's Memorandum Opinion and Order of August 29, 1986 to arbitration.

IT IS FURTHER ORDERED that this Preliminary Injunction shall remain in effect until a trial on the merits of this action or until further Order of the Court.

IT IS FURTHER ORDERED that this Order be served by any person who is at least eighteen years of age and not a party to this action selected for that purpose by the plaintiff. Service of a copy of this Order upon any attorney appearing in this matter on behalf of any defendant or defendants shall be deemed to be served upon such defendant or defendants.

Dated: September 5th, 9:00 o'clock A.M., 1986.

/S/ FRED J. NICHOL
United States District Judge

September 5th, '86

Supreme Court, U.S.
FILED
MAR 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN MORRELL & CO.,
Petitioner,
v.
LOCAL 304A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE MURPHY
RICHARD ROESEL
1775 K Street, N.W.
Washington, D.C. 20006

ROBERT S. BATES, JR.
201 North Wells, Suite 1900
Chicago, Illinois 60606

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	5
I. Because The Parties Have Not Agreed To Arbitrate The Employer's Breach-of-Contract Claim, This Case Does Not Pose The Question That Divided The Court in *Buffalo Forge*	6
II. Petitioner Has Not, In Any Event, Offered Any Justification For Reopening The Question Settled In *Buffalo Forge*	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Atkinson v. Sinclair Refining Company, 370 U.S. 238 (1962) 9

Boys Markets v. Clerks Union, 398 U.S. 235 (1970) 6-7, 9, 10

Buffalo Forge Co. v. Steelworkers, 428 U.S. 397 (1976) ..... *passim*

Complete Auto Transit v. Reis, 451 U.S. 401 (1981) 10

Jacksonville Bulk Terminals v. Longshoremen, 457 U.S. 702 (1982) 5, 6, 9, 10

Nat'l Wrecking Co. v. Kumerow, 606 F. Supp. 374 (N.D.Ill. 1985) 12

Transcaribbean Motors Transport, Inc. v. Union de Tronquistas, 553 F. Supp. 362 (D.P.R. 1982) .. 12

Tudor Fashions Ltd. v. Romney, 634 F. Supp. 297 (S.D.N.Y. 1986) 12

STATUTES:

Norris-LaGuardia Act, § 4, 29 U.S.C. § 104 ..... *passim*

MISCELLANEOUS:

BNA, *Basic Patterns in Union Contracts* (8th ed. 1978) 11

BNA, *Basic Patterns in Union Contracts* (11th ed. 1986) 11

Comment, *Labor Law—Buffalo Forge Co. v. United Steelworkers: The End of the Erosion of the Norris-LaGuardia Act*, 55 No. Car. L. Rev. 1247 (1977) 7

Comment, *Boys Markets Injunctions Against Employers: Lever Bros., Inc. v. Chemical Workers, Local 217*, 91 Harv. L. Rev. 715 (1978) 7

Freed, *Injunctions Against Sympathy Strikes: In Defense of Buffalo Forge*, 54 N.Y.U.L. Rev. 289 (1979) 7

Note, 88 Harv. L. Rev. 463 (1974) 7

Note, *Sympathy Strikes and Federal Court Injunctions*, 27 Louisiana L. Rev. 926 (1977) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1226

JOHN MORRELL & CO.,
Petitioner,

v.

LOCAL 304A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

The opinions below, basis for invoking this Court's jurisdiction, and statutory provisions involved are correctly set forth in the Petition for Certiorari at pp. 1-2, and we therefore do not reprint those materials here.

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case presents a fundamentally misleading impression of the relevant facts. Accordingly, we begin by setting the record straight.

Respondents United Food and Commercial Workers International Union and its Local 304A (collectively referred to herein as "the Union") are the exclusive representative of the production and maintenance employees at the Sioux Falls, South Dakota meat packing plant of petitioner John Morrell & Co. ("Morrell" or "the Employer"). The Union and Morrell are parties to a collective bargaining agreement covering the Sioux Falls plant.

Two aspects of that agreement are of relevance here:

First, the agreement contains a no-strike clause which, after noting that the parties have agreed to procedures "for the peaceful settlement of any disputes which may arise between the Company and the Union," prohibits strikes "on account of such disputes until an earnest effort has been made to settle all such matters in the manner provided in the . . . agreement[]." *See* Pet. at 3-4.

Second, the agreement establishes a four-step procedure for adjusting grievances arising under the contract and provides that "[i]f the grievance is not resolved in th[e fourth] step, the Local Union may submit it to arbitration." The agreement goes on to specify the procedure by which the Local Union may do so:

> A grievance shall be submitted to arbitration by written notice to the [Morrell] Director of Industrial Relations for the Company. Such notice shall be sent not later than six months after the Local Union has received the written answer of the Company. . . .[1]

---

[1] The provisions of the collective bargaining agreement establishing the grievance-arbitration machinery are reprinted in an appendix to this Brief. Those provisions are in two parts: first, provisions that apply only to the Sioux Falls and that are contained in a "local agreement," *see* App. 1a-2a, and second, provisions that apply both to Sioux Falls and one other Morrell plant and that are contained in a "master agreement," *see* App. 2a-6a.

The agreement contains no procedure by which the Employer may file grievances or appeal grievances to arbitration, and Morell has never attempted to do so during the parties' long-standing bargaining relationship.[2]

On August 4, 1985, Local 340 of the United Food and Commercial Workers—the Local that represents the employees at Morrell's Arkansas City plant—placed a lawful picket line in front of Morrell's Sioux Falls plant in furtherance of that Local's lawful economic strike against Morrell. With a few exceptions, the Sioux Falls hourly employees declined to cross the picket line at their plant.

Believing that the refusal of its Sioux Falls employees to cross the picket line constituted a violation of the no-strike clause in the Sioux Falls collective bargaining agreement, Morrell, as was its right, immediately filed a breach of contract action in South Dakota state court seeking legal and equitable relief. That suit was removed to federal court on the day it was filed. The following day, the Arkansas City local withdrew its picket line and the Sioux Falls employees returned to work.

To penalize the employees who had failed to report to work on August 4th, Morrell noted or threatened to note each employee's absence as "unexcused" in the employee's files. On August 8, 1985, the Union filed a class grievance with Morrell alleging that any such disciplinarly action would be improper under the collective bargaining agreement. The Union's grievance thus put in issue the question whether the employees' actions had violated the no-strike provision of the agreement. To this day, more than seven months after the grievance was filed, Morrell has failed to respond to the grievance and thus the grievance remains stymied in the initial step of the grievance procedure.

---

[2] Affidavit of James Lyons, December 1, 1986, ¶ 5.

On August 15, 1985, the Arkansas City Local resumed picketing the Sioux Falls plant and once again the Sioux Falls employees declined to report to work. Morrell immediately filed the instant case in federal court which, like the earlier suit, alleged a breach of contract by the Union, its officers and "John Doe and Other Persons Unknown." Morrell again sought legal and equitable relief.

On the same day that this action was filed, the district court granted a temporary restraining order against the defendants. On August 29, 1985, the district court issued a preliminary injunction which prohibited the defendants from "calling, instigating, directing, encouraging, causing, assisting or participating in a strike, work stoppage . . . or interruption with the operation of plaintiff's Sioux Falls plant . . ." Pet. App. A-21. The district court based the injunction on a finding that the second work stoppage was a "dispute over an arbitrable issue, *i.e.*, the right under the collective bargaining agreement to discipline these workers." *Id.* A-16.

Defendants appealed the preliminary injunction to the United States Court of Appeals for the Eighth Circuit. On October 30, 1986, that court reversed the injunction. The court of appeals could "find no support in the record" for the district court's finding that the August 15th work stoppage was over the discipline imposed by Morrell; indeed, that court found that the Union "has sought, not avoided, arbitration of the grievance," *Id.* A-7. That being so, the court of appeals concluded that the injunction was contrary to § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, as that Act has been interpreted by this Court in *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976).[3]

---

[3] Three weeks after the Eighth Circuit issued its decision Morrell —for the first time in this case—filed a motion to compel arbitration over the question of whether the work stoppages that occurred on August 4th and 15th were in breach of contract. The Union resisted

ARGUMENT

In its petition, Morrell states that the Company "does not seek review of the Eighth Circuit's interim ruling that the strikes at issue were sympathy strikes," and were not strikes over an arbitrable dispute. Pet. at 5 n.2. Rather, Morrell urges this Court to grant certiorari for the sole purpose of reconsidering a question that this Court resolved, after plenary consideration, in *Buffalo Forge*, a resolution which was reaffirmed less than five years ago in *Jacksonville Bulk Terminals v. Longshoremen*, 457 U.S. 702 (1982). For two independent reasons, we submit, the petition should be denied.

First, this case does not squarely raise the question petitioner attempts to tender to this Court. This is not a case in which an employer is required, or even permitted, to invoke arbitration to determine whether a work stoppage is in breach of contract, and thus this is not a case in which an injunction is sought pending arbitration. Rather, this case falls into the category of cases as to which all Members of the Court in *Buffalo Forge* agreed that an injunction is barred by the Norris-LaGuardia Act: *viz.*, a case in which the parties have *not* agreed to submit the employer's contract claims to arbitration. *See* Part I, *infra*.

---

that motion on the ground that Morrell had no right, under the contract, to appeal any grievance to arbitration, and that Morrell had blocked the Union from arbitrating its grievance over the discipline by Morrell's failure to answer that grievance. By order dated December 22, 1986, the district court denied Morrell's petition to compel arbitration. Morrell's damage action is thus pending before the district court at the present time; the Union has answered and denied that the no-strike provision in the collective bargaining agreement extends to sympathy strikes.

To date, and notwithstanding the position the Union took in response to Morrell's motion to compel arbitration, Morrell still has not responded to the Union's grievance. Accordingly, that grievance remains pending in the initial step of the grievance procedure.

Second, even if the question that divided the Court in *Buffalo Forge* were presented here, petitioner has not shown any reason for reconsidering the holding of that case. Petitioner has not shown that *Buffalo Forge* has posed practical problems for labor-management relations, nor has petitioner pointed to any intervening decisions or events that call into question the Court's analysis in *Buffalo Forge*. Rather, petitioner merely rehearses the very arguments that were made to this Court in *Buffalo Forge* and again in *Jacksonville Terminals*, and that the Court properly found unpersuasive. *See* Part II, *infra*.

I. Because The Parties Have Not Agreed To Arbitrate The Employer's Breach-of-Contract Claim, This Case Does Not Pose The Question That Divided The Court in *Buffalo Forge*.

A. Section 4 of the Norris-LaGuardia Act forbids federal courts from issuing injunctions "in any case involving or growing out of any labor dispute to prohibit any person . . . from . . . [c]easing or refusing to perform any work . . ." In *Boys Markets v. Clerks Union*, 398 U.S. 235 (1970), this Court carved out an exception to Norris-LaGuardia's general anti-injunction rule in order "to accommodate and harmonize" that Act with "the congressional policy to promote the peaceful settlement of labor disputes through arbitration." *Id.* at 241. Reasoning that "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes" and that this "basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate," *id.* at 249, the Court held that, notwithstanding Norris-LaGuardia, a strike " 'over a grievance which both parties are contractually bound to arbitrate' " may be enjoined, *id.* at 254.

In *Buffalo Forge*, this Court faced the question of whether the " 'narrow' " *Boys Market* exception, 428 U.S.

at 406, *quoting Boys Market*, 398 U.S. at 253, should be extended to a case in which "[t]he employer . . . was entitled to invoke the arbitral process to determine the legality of [a] sympathy strike," but the "strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract," *Buffalo Forge*, 428 U.S. at 405, 407 (emphasis in original). The Court held that *Boys Market* was inapplicable to such a case and that Norris-LaGuardia foreclosed injunctive relief.

In reaching this conclusion, the *Buffalo Forge* Court reasoned that because the sympathy strike "had neither the purpose nor the effect of denying or evading an obligation to arbitrate," there was no need "to accommodate § 4 of the Norris-LaGuardia Act" in order "to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties." *Id.* at 407-08. The Court concluded that absent such a need, the "allegation of the complaint that the union was breaching its obligation not to strike did not in itself warrant an injunction." *Id.* at 409.[4]

The dissenting Justices disagreed with the majority's first premise, arguing as follows:

> A sympathy strike in violation of a no-strike clause does not directly frustrate the arbitration process, but if the clause is not enforceable against such a

---

[4] Contrary to petitioner's suggestion, *see* Pet. at 7 n.4, a number of scholars have agreed with the Court's reasoning in *Buffalo Forge* and with the result the Court reached. *See, e.g.*, Freed, *Injunctions Against Sympathy Strikes: In Defense of Buffalo Forge*, 54 N.Y.U.L. Rev. 289 (1979); Note, *Sympathy Strikes and Federal Court Injunctions*, 37 Louisiana L.Rev. 926 (1977); Comment, *Boys Markets Injunctions Against Employers: Lever Bros., Inc. v. Chemical Workers, Local 217*, 91 Harv. L. Rev. 715 (1978); Comment, *Labor Law—Buffalo Forge Co. v. United Steelworkers: The End of the Erosion of the Norris-LaGuardia Act*, 55 No. Car. L. Rev. 1247 (1977); *see also*, Note, 88 Harv. L. Rev. 463 (1974).

> strike, it does frustrate the more basic policy of motivating employers to agree to binding arbitration by giving them an effective "assurance of uninterrupted operation during the term of the agreement." [*Id.* at 423-24 (Stevens, J., dissenting).]

Significantly, however, the dissenters did *not* disagree with the majority's second premise, *viz.*, that a strike cannot be enjoined merely because the strike is in breach of contract. The dissenters thus stated an important limitation on the extent to which they believed Norris-LaGuardia allows injunctions of sympathy strikes which are in breach of contract:

> It is not necessary to hold that an injunction may issue if the scope of the no-strike clause is not a clearly arbitrable issue. If the agreement contains no arbitration clause whatsoever, enforcement of the no-strike clause would not promote arbitration by encouraging employers to agree to an arbitration clause in exchange for a no-strike clause. *Furthermore, even if the agreement contains an arbitration clause, but the clause does not clearly extend to the question whether a strike violates the agreement, then the parties' commitment to enforcement of the no-strike clause through enforcement of the arbitrator's final decision also remains unclear.* [*Id.* at 426-27 n.20 (emphasis added) (Stevens, J., dissenting).]

Thus, although the *Buffalo Forge* Court was divided over the propriety of an injunction where "[t]he employer . . . was entitled to invoke the arbitral process to determine the legality of the sympathy strike," 428 U.S. at 405 (majority opinion), the Court was *unanimous* in holding that Norris-LaGuardia precludes an injunction where the employer's right to invoke arbitration is not established.

B. The instant case falls squarely into the latter category, and thus does not raise the question that divided the Court in *Buffalo Forge* and which petitioner seeks to

tender to the Court here. As we have seen, the collective bargaining agreement between Morrell and the Union contains no provision which authorizes the Employer to file grievances, let alone to appeal a grievance to arbitration. To the contrary, the agreement provides only that "the Local Union may submit [a grievance] to arbitration." P. 2, *supra*. Thus, what the Court found to be true in *Atkinson v. Sinclair Refining Company*, 370 U.S. 238, 243 (1962), is equally true here: there is "not a word in the grievance and arbitration article providing for the submission of grievances by the company" and "no place in the contract does the union agree to arbitrate at the behest of the company." Rather, the agreement "expressly provides that arbitration may be invoked only at the option of the union." *Id.*

Accordingly, the Employer's remedy here, as in *Atkinson*, is "to take its claims elsewhere," namely to state or federal court. *Id.* And nothing in the federal policy favoring "the peaceful settlement of labor disputes through arbitration," *Boys Market*, 398 U.S. at 241, justifies interpreting Norris-LaGuardia to permit injunctions prior to a judicial adjudication of the lawfulness of a strike. Thus, on any reading of *Buffalo Forge*, this case simply does not raise any issue warranting this Court's attention.

II. Petitioner Has Not, In Any Event, Offered Any Justification For Reopening The Question That Was Settled In *Buffalo Forge*.

Buffalo Forge was decided by this Court roughly a decade ago following plenary consideration, and with the benefit of briefing not only by the parties to the case but also by four *amici curiae* (including the Chamber of Commerce and the National Association of Manufacturers). The ruling in *Buffalo Forge* was reaffirmed less than five years ago, in *Jacksonville Terminals*, in which this Court, again following plenary consideration, expressly "decline[d an] invitation" to "reconsider our de-

cision in *Buffalo Forge*." 457 U.S. at 723 n.23. *See also Complete Auto Transit Co. v. Reis*, 451 U.S. 401, 416-17 n.18 (1981).

Even if *arguendo*, this case raised the issue decided in *Buffalo Forge* and reaffirmed in *Jacksonville Terminal*, petitioner offers no justification for reopening that which this Court has so recently settled. In the main, petitioner simply rehearses the arguments that were made by the employer and its supporting *amici curiae* in *Buffalo Forge* and that failed to carry the day. *See* Pet. 10-23. The opinion in that case speaks for itself, and rather than using our own words to respond to petitioner's attack, we rest on Justice White's opinion for the Court in *Buffalo Forge*.[5]

The only new argument petitioner advances is the claim that, in practice, *Buffalo Forge* has "complicate[d] the courts' role and discourage[d] employers from agree-

---

[5] It is noteworthy that the bulk of petitioner's attacks on *Buffalo Forge* are based on arguments for permitting injunctions *whenever* a strike is claimed to be in breach of contract, *regardless of whether the contract claim is arbitrable*. After all, the denial of injunctive relief "allow[s] unions to avoid express no-strike pledges," Pet. at 12, whether or not the pledge is subject to arbitration; the denial of injunctive relief will have an equal impact on employers' willingness to "agree[] to arbitration," *id.* at 18, regardless of whether a grievance over breach of the no-strike clause is itself arbitrable; and the denial of injunctive relief "effectively dispossesse[s] state courts of their right to enforce collective bargaining agreements by enjoining illegal sympathy strikes," *id.* at 22, again without regard to whether enforcement is through arbitration.

Thus, in the main, petitioner is seeking a vast *expansion* of the *Boys Market* exception to Norris-LaGuardia—an expansion which would loose that exception from its original rationale.

Petitioner advances only one point that is in any way tied to the concerns underlying *Boys Market: viz.*, that *Buffalo Forge* "marks an extreme departure from this Court's policy favoring arbitration of labor disputes over industrial warfare." Pet. at 16. That is precisely the point that was the principal subject of discussion in the opinions in *Buffalo Forge* and that the majority, for reasons stated at length in its opinion, found unpersuasive.

ing to arbitration." Pet. at 18. According to petitioner, cases subsequent to *Buffalo Forge* reveal that "[d]eciding whether a strike is a sympathy strike, as opposed to a strike over an arbitrable issue, embroils trial courts and courts of appeals in complicated and intricate hearings concerning the nature of industrial disputes and a union's motives in striking." *Id.* And petitioner further claims that the ultimate result of *Buffalo Forge* is to "discourage employers from agreeing to binding arbitration." *Id.* at 20. Petitioner is in all respects mistaken.

To begin with, petitioner's professed fear that *Buffalo Forge* has "discourage[d] employers from agreeing to binding arbitration," Pet. at 20, is wholly lacking in any empirical support. The Bureau of National Affairs most recent survey of major collective bargaining agreements finds that 99% now contain arbitration clauses, an *increase* of 3% from the figure a decade ago, when *Buffalo Forge* was decided.[6] We know of no statistical—or even anecdotal—evidence to suggest that *Buffalo Forge* has led employers to seek to eliminate arbitration procedures from labor contracts or to oppose the inclusion of such procedures.

Nor is there any merit to petitioner's suggestion that identifying a "sympathy strike" is a "complicated and intricate task." As the record in this case illustrates, there are certain easily-ascertained hallmarks of almost every sympathy strike: a group of employees (other than the employees whose conduct is at issue) are engaged in a labor dispute with their employer; in furtherance of that dispute, those employees place pickets in front of some workplace; and another group of employees, who are not directly involved in the labor dispute, elect to honor the picket line and decline to report to

---

[6] *Compare* BNA, *Basic Patterns in Union Contracts* (11th ed. 1986) p. 37 with BNA, *Basic Patterns in Union Contracts* (8th ed. 1978), p. 37.

work. Given these telltale signs, most sympathy strikes are easy to detect.

To be sure, in this area, as in any other area of the law, there will be, at the margins an occasional case in which it will not be clear whether the strike is over an arbitrable issue. The rarity of such cases is illustrated by the fact that of the over one hundred and seventy lower-court cases which have relied on *Buffalo Forge* over the past decade, petitioner is able to cite only three cases, *see* Pet. at 19 n.7, in which courts allegedly have had difficulty in determining whether a strike was a sympathy strike, and even those cases do not support petitioner's claim.[7] Moreover *any* rule establishing the conditions that must be satisfied for injunctive relief—including the rule petitioner champions under which injunctions would be available whenever a court determines that a no-strike provision covers sympathy strikes—will generate some "complicated and intricate" cases. Indeed in each of the three cases petitioner cites to illustrate the alleged difficulties in applying *Buffalo Forge*, the courts would have faced precisely the same "difficulty" under petitioner's proposed rule, as in each case the determinative issue was *not* whether the strike was over an arbitrable dispute but whether the no-strike clause applied to the work stoppage at hand. *See* n.7 *supra*.

---

[7] In *Tudor Fashions, Ltd. v. Romney*, 634 F.Supp. 297 (S.D.N.Y. 1986), the employer who attempted to invoke the no-strike clause, although arguably an alter ego of the signatory employer, was not a party to the collective bargaining agreement; the question for decision was whether the no-strike clause ran in that employer's favor. In *Nat'l Wrecking Co. v. Keumerow*, 606 F. Supp. 374 (N.D. Ill. 1985), the court did not reach the arbitrability issue, having determined that the strike was over an issue about which the employees had a right to strike under the no-strike clause. And in *Transcaribbean Motors Transport, Inc. v. Union de Tronquistas*, 553 F. Supp. 362 (D.P.R. 1982), which was an action for *damages* based on alleged provision breach of a no-strike clause, the scope of the arbitration—which applied only to specific enumerated cases —was readily ascertainable, but was of importance only in interpreting the scope of the narrow no-strike clause.

In sum, petitioner has failed to offer any basis to warrant reopening the issue settled in *Buffalo Forge*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE MURPHY
RICHARD ROESEL
1775 K Street, N.W.
Washington, D.C. 20006

ROBERT S. BATES, JR.
201 North Wells, Suite 1900
Chicago, Illinois 60606

DAVID SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

APPENDIX

APPENDIX

APPENDIX

Grievance Procedure

46. All grievances handled through the Union, whether individual or group, shall be presented in writing and handled in the following manner:

First Step: Between the aggrieved Employee or group of Employees either with or without a Union representative and the supervisor of the department, who may elect to call in his divisional superintendent. The supervisor shall answer in writing not later than the following work day. If no satisfactory adjustment is arrived at, then:

Second Step: Between the representatives designated by the Union and the aggrieved Employee or group of Employees and the Manager of Hourly Employees or other representative designated by the Company. The Company representative shall answer in writing the second work day following unless unusual circumstances should warrant additional time to answer. If no satisfactory adjustment is arrived at, then:

Third Step: Between the representatives designated by the Union and the Manager of Personnel—Labor Relations, or other representative designated by the Company. The Company representatives hearing the grievance shall give a written answer by the third work day following unless unusual circumstances should warrant additional time to answer.

47. Fourth Step: Failure to resolve a grievance after concluding the first three (3) steps of grievance procedure, as contained in local agreement, grievances may be appealed in accordance with the provisions of Sections 84, 85 and 86 of the Master Agreement.

48. Priority Grievances: Discharge Grievances. The Union may request an immediate meeting and such re-

quest will be granted as soon as the designated Union representatives can be replaced by a qualified Employee.

49. No grievance, with the exception of those pertaining to job rates, will be processed unless filed within 30 working days of the circumstance that provoked the grievance.

50. When it becomes necessary to schedule meetings it shall be done by appointment. However, matters pertaining to discharges which cannot reasonably be delayed, may be presented at any time.

51. The Business Agent of the Union shall be allowed access to the plant at any time to conduct Union business.

52. Officers of the Union and elected stewards will be given time to handle union matters as necessary with permission from the supervisor just as soon as a replacement can be put in their places and such a request will not be unreasonably delayed.

* * * *

XXI

GRIEVANCE PROCEDURE

83. (a) The grievance procedure now in effect at each plant with respect to all steps involving representatives of the Company shall remain in effect except as changed by local agreement.

(b) Warnings, disciplinary actions or other such information concerning an Employee's individual work record which are more than two (2) years old shall not be considered in disciplinary actions.

(c) The Company shall not discharge any Employee for receiving garnishments from up to 5 creditors in any 12 month period.

(d) The Company shall not hold any conference or interview with an Employee who is the subject of any investigation or who is being interviewed in connection with the imposition of discipline or the issuance of a warning which is to be entered in the Employee's record (provided such interview or conference goes beyond the announcement of the disciplinary action or the delivery of the warning), unless the Company shall have advised the Employee of his right to be represented at such occasion by a Union representative of his choice and shall afford the Employee, if he or the Union representative so request, the opportunity to consult privately with such representative before the commencement of the meeting.

(e) No letters or notations of warning or of disciplinary action shall be entered in any Employee's personnel record unless the Company first advises the Employee of its intent to enter such writings in his record and affords him an opportunity to read such material. Upon reasonable notice, an Employee shall be afforded an opportunity to read and obtain copies of any material in the Employee's personnel record or file concerning verbal or written warnings or disciplinary action affecting such Employee or any other material in the Employee's personnel file relevant to a pending grievance which is brought on behalf of such Employee.

(f) No Employee will be required to submit to an examination by lie detector machine (polygraph), stress test evaluator or other similar device.

84. (a) When the steps in the local grievance procedure as specified in Section 83 above have been completed, grievances other than those described in the next sentence may be appealed to a step called the "National Step". Grievances involving discharge or other discipline, seniority (except for questions relating to or growing out of inter-plant transfer), and job loads may be submitted by a local union directly to arbitration if not re-

solved at the highest step of the local grievance procedure, provided that the International Union and the Company Corporate Labor Relations Department may participate in any such arbitration.

(b) When a grievance involving a matter referred to in subparagraph (a) above has been submitted to arbitration by a Local Union, the Company Director of Industrial Relations or the Director of the Packinghouse Division of the International Union may request a pre-arbitration meeting to discuss the case. Such meeting shall be requested only if the case is unusual or complex and if they agree that such a meeting may help to expedite the arbitration hearing by clarification of the issues. Such meeting shall not delay or interfere with the selection of the arbitrator and scheduling of the hearing.

85. In the National Step, the Director of Industrial Relations for the Company, or his representative, and the Director of the Packinghouse Division of the International Union, or his representative, shall meet, together with such representatives of the Local Union or of the local plant management as either shall deem necessary. If the grievance is not resolved in this step, the Local Union may submit it to arbitration. Until August 31, 1985, such meeting shall be held in a city designated by the International Union, which shall be not more than 100 miles from the plant city unless the Company agrees to a meeting in a more distant city.

86. (a) A grievance shall be submitted to arbitration by written notice to the Director of Industrial Relations for the Company. Such notice shall be sent no later than 6 months after the Local Union has received the written answer of the Company in the National Step (in the case of grievances other than those involving discharge or other discipline) or no later than 6 months after the Local Union has received the written answer of the Company in the highest step of the grievance procedure in

effect locally (in the case of grievances involving discharge or other discipline). A grievance which has not been submitted within the 6 month time limit shall be null and void and not subject to further appeal or arbitration.

(b) Grievances which are submitted to arbitration shall be presented to an arbitrator whose decision shall be final and binding on all parties involved. In making such decision, the arbitrator shall be bound and governed by the provisions of this Agreement and of the applicable local agreement or agreements at the plant in which the grievance arose, and shall be restricted to the application of said agreements to the facts relevant to the grievance. Where more than one grievance from any one plant has been submitted to arbitration and notices of such submissions have been given within 30 days of each other, either party, in the interest of economy, shall have the right to have the grievances presented to the same arbitrator at the same sitting, provided that after a total of 50 cases have been arbitrated under this Section 86(b) in such multi-grievance proceedings, either party, on written notice to the other, may reopen the question as to whether this provision with respect to such proceeding shall be retained in the Agreement. The expense of the arbitration shall be shared jointly by the parties.

(c) The parties shall establish a panel of 3 arbitrators for disputes processed pursuant to this Section 86. Unless the parties designate the panel arbitrator by mutual agreement, selection of the arbitrator from the panel shall be made in rotation, provided that if the arbitrator selected for any dispute is not available to hear or decide the dispute promptly and within the time limitations herein set forth, the next panel arbitrator in line shall be designated for such dispute.

(d) In the arbitration of any grievance, briefs shall not be submitted to the arbitrator unless either party

requests otherwise at the arbitration hearing, in which case briefs of both parties shall be delivered to the arbitrator by depositing in the mail no later than 7 days after the close of the hearing (or if either party has ordered a transcript, then no later than 21 days after the close of the hearing) and there shall be no extension of time for filing briefs. Unless the parties agree to extend the time, the arbitrator shall render his decision within 14 days after the close of the hearing or the receipt of briefs, if applicable, in a case involving discharge or other discipline and within 30 days after the close of the hearing or the receipt of briefs, if applicable, in all other cases, provided that failure of the arbitrator to render a decision within the time herein prescribed shall not invalidate his decision.

* * * *

No. 86-1226

Supreme Court, U.S.
FILED
APR 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN MORRELL & CO.,

Petitioner,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

GEORGE A. JOSEPH
(Counsel of Record)
MICHAEL P. FORADAS
CHAIM T. KIFFEL
KATHERINE C. GRADY
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2274

Of Counsel:
RAYMOND W. GASS
MIGUEL F. UGARTE
JOHN MORRELL & CO.
191 Waukegan Road
Northfield, Illinois 60093

LAWRENCE I. KIPPERMAN
JEAN F. HOLLOWAY
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7471

Dated: April 1, 1987

Pandick Midwest, Inc., Chicago • (312) 733-6000

13pp

TABLE OF CONTENTS*

	PAGE
Table of Authorities	ii
I. This Case Squarely Presents The Issue Of Whether *Buffalo Forge* Should Be Overruled	1
A. The Eighth Circuit Held That *Buffalo Forge* Was Controlling	2
B. *Buffalo Forge* Was Not Unanimous In Any Respect	2
II. Blind Adherence To *Stare Decisis* Is Inappropriate Given The Paradoxical And Harmful Effects of *Buffalo Forge*	5
Conclusion	10

* The statement of Parties to the Proceedings pursuant to Supreme Court Rule 28.1 appears at page ii of the Petition. There have been no changes to the parties in the interim.

TABLE OF AUTHORITIES

PAGE

Cases

Boys Markets, Inc. v. *Retail Clerks Union*, 398 U.S. 235 (1970) ..... *passim*

Buffalo Forge Co. v. *United Steelworkers*, 428 U.S. 397 (1976) ..... *passim*

Burlington Northern Railroad Co. v. *Brotherhood of Maintenance of Way Employees*, 55 U.S.L.W. 3552 (U.S. Feb. 17, 1987) (No. 86-39) 7

Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) 6

H. K. Porter Co. v. *Local 37, United Steelworkers of America*, 400 F.2d 691 (4th Cir. 1968) 4

Jacksonville Bulk Terminals, Inc. v. *International Longshoremen's Ass'n*, 457 U.S. 702 (1982) 5, 6, 7

Laundry, Dry Cleaning and Dye House Workers Int'l Union v. *Mahoney*, 491 F.2d 1029 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974) 4

Sinclair Refining Co. v. *Atkinson*, 370 U.S. 195 (1962) 6

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 4

Other Authorities

BNA, *Basic Patterns in Union Contracts* (11th ed. 1986) 8

BNA, *Basic Patterns in Union Contracts* (8th ed. 1975) 8

Freed, *Injunctions Against Sympathy Strikes: In Defense of* Buffalo Forge, 54 N.Y.U. L. Rev. 289 (1979) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN MORRELL & CO.,

Petitioner,

v.

LOCAL UNION 304A OF THE UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO AND CLC; and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO AND CLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

Respondents evade the question presented for review. Most of their brief is devoted to a demonstrably erroneous claim that the issue of whether *Buffalo Forge* should be overruled is not squarely before this Court. When respondents do address the merits of Morrell's petition, they do little more than urge blind adherence to *stare decisis*. They offer no reason why this Court should decline to reconsider a decision that experience has shown to be at odds with sound national labor policies previously recognized by this Court. Accordingly, the petition should be granted.

I. This Case Squarely Presents The Issue Of Whether *Buffalo Forge* Should Be Overruled.

Respondents' principal argument is that "this case does not squarely raise the question petitioner attempts to tender to this

Court." (Resp. at 5) That argument ignores both the clear holding of the Eighth Circuit below and the deep division between the majority and dissenters in *Buffalo Forge*.

A. The Eighth Circuit Held That *Buffalo Forge* Was Controlling.

The Eighth Circuit began its analysis by focusing on "the congressional limitation on a federal court's jurisdiction to issue orders enjoining a strike, set out in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104." (A-4, 804 F.2d at 459) Relying on *Buffalo Forge*, the court explained that "a *Boys Markets* injunction may not issue unless the strike has been triggered by an arbitrable dispute." (A-5, 804 F.2d at 459) Concluding that there was "no evidence" that the strikes were "over an arbitrable grievance," the Eighth Circuit held that the strikes at issue were sympathy strikes and therefore barred by *Buffalo Forge*. (A-10, 804 F.2d 462) In short, the court squarely rested its decision on *Buffalo Forge*, and Morrell has squarely presented to this Court the question of whether *Buffalo Forge* should therefore be overruled.

B. *Buffalo Forge* Was Not Unanimous In Any Respect.

Respondents also argue that this Court's sharp division in *Buffalo Forge* does not extend to the facts of this case because the Court in *Buffalo Forge* was supposedly "*unanimous* in holding that Norris-LaGuardia precludes an injunction where the employer's right to invoke arbitration is not established." (Resp. at 8) (emphasis in original) Even if respondents were correct in their assertion that Morrell cannot seek arbitration, nothing in either the majority or dissent in *Buffalo Forge* suggests that any member of this Court attached any significance to whether the employer could initiate arbitration. The majority concluded that preliminary injunctions against sympathy strikes were not necessary because "[t]he *quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration

machinery." 428 U.S. at 407. Thus, the majority's obvious concern was whether an injunction was necessary to enforce the parties' agreement to resolve industrial disputes through arbitration instead of economic warfare, not whether the employer could initiate the process.

Justice Stevens, writing for the dissenters, made clear that their quarrel with the majority was that a refusal to enjoin sympathy strikes would frustrate arbitration and deprive employers of the benefit of their bargain. Again, the focus was on the employer's agreement to arbitrate in return for the union's no-strike pledge—not on whether the employer could itself demand arbitration. As the very first line of the dissent states: "A contractual undertaking not to strike is the union's normal *quid pro quo* for the employer's undertaking to submit grievances to binding arbitration." 428 U.S. at 413. For this reason, "[i]f the sympathy strike in this case violates the Union's no-strike pledge, the same public interest in an enforceable *quid pro quo* is present here as in *Boys Markets.*" 428 U.S. at 419. There is simply nothing in the dissent to suggest that enforcement of the union's no-strike promise should be dependent in any way on whether the employer can initiate arbitration.[1] This case thus plainly presents the issue that divided this Court five-to-four in *Buffalo Forge:* "whether a federal court may enjoin a sympathy strike pending the arbitrator's decision as to whether the strike is forbidden by the express no-strike clause." 428 U.S. at 399.

---

[1] Justice Stevens' observation that an injunction may be inappropriate where an arbitration clause "does not clearly extend to the question whether a strike violates the agreement" (428 U.S. at 426-27 n.20, *quoted in* Resp. at 8), does not require that the employer be able to invoke arbitration. Rather it merely highlights the common sense proposition—with which Morrell agrees—that an injunction is inappropriate if the scope of the no-strike clause cannot be determined through arbitration. Here, it is undisputed that the parties' arbitration clause "clearly extend[s] to a question whether a strike violates the agreement." Respondents concede, as they must, that they have filed a grievance that "put in issue the question whether the employees' actions had violated the no-strike provision of the agreement." (Resp. at 3)

Moreover, the Court's opinion in *Boys Markets*, from which *Buffalo Forge* took its departure, in no way suggests that the employer must be entitled to initiate arbitration in order to obtain a preliminary injunction.[2] The entire premise of the Court's decision in *Boys Markets* was that employers will agree to submit to binding arbitration of union grievances only if unions are required to live up to their end of the bargain and refrain from striking while the process runs its course:

> Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of individual disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate. 398 U.S. at 249.

It is precisely this policy that Morrell contends is frustrated by *Buffalo Forge*. Whether Morrell can invoke the Agreement's arbitration and grievance procedures is wholly irrelevant.[3]

---

[2] Even the principal commentator cited by respondents (Resp. at 7 n.4) acknowledges that the critical issue in *Boys Markets* was whether an injunction was proper "when the strikes concerned grievances *the union* had agreed to settle by arbitration alone." Freed, *Injunctions Against Sympathy Strikes: In Defense of* Buffalo Forge, 54 N.Y.U. L. Rev. 289 (1979) (emphasis added).

[3] Nevertheless, Morrell does not agree that it cannot request arbitration, particularly in light of this Court's long-standing policy of resolving all doubts in favor of arbitration, *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960), and the Agreement's broad recognition of the need for peaceful resolution of *all* disputes. *See, e.g., H. K. Porter Co.* v. *Local 37, United Steelworkers of America*, 400 F.2d 691, 695 (4th Cir. 1968); *Laundry, Dry Cleaning and Dye House Workers Int'l Union* v. *Mahoney*, 491 F.2d 1029, 1032-33 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974).

II. Blind Adherence To *Stare Decisis* Is Inappropriate Given The Paradoxical And Harmful Effects Of *Buffalo Forge*.

Respondents never mention, let alone refute, the most compelling reason for overruling *Buffalo Forge*—the intolerable and unwarranted paradox it created. (Pet. at 7, 11) Under *Boys Markets*, employers can enjoin strikes over issues that go to the core of their employees' terms and conditions of employment because those issues are generally arbitrable. Under *Buffalo Forge*, however, employers are powerless to compel employees to return to work where the strike is not only unrelated to a core issue, but has nothing to do with any dispute between the employer and the striking employees. Employers are deprived of the benefit of a union's no-strike promise precisely where that protection makes most sense, all because of the "artificial" reasoning of *Buffalo Forge*. *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n*, 457 U.S. 702, 730 (1982) (Powell, J., dissenting).

In addition to failing to account for this paradox, respondents do nothing to meet Morrell's showing that *Buffalo Forge* has undermined the three central policies articulated in *Boys Markets:* (1) enforcing collective bargaining agreements in general and no-strike clauses in particular, 398 U.S. at 252-53; (2) encouraging parties to agree to arbitration while avoiding judicial interference with the arbitration process, *id.* at 242-43; and (3) protecting concurrent state court jurisdiction, *id.* at 243-47. *Buffalo Forge* did not purport to limit—or even question—any of these policies. Nor do respondents question their applicability here. Experience has shown that *Buffalo Forge* frustrates each of them, upsetting the delicate balance struck in *Boys Markets* between Norris-LaGuardia and section 301 of the Labor Management Relations Act. (*See* Pet. at 12-22)

Respondents make no effort to defend this result. Instead, they simply allege that similar arguments "failed to carry the

day" in *Buffalo Forge.*[4] But Morrell's petition pointed out that *Buffalo Forge* should be overruled precisely because its adverse effect on national labor policy was not apparent when it was decided. Under these circumstances, adherence to *stare decisis* is not appropriate. As this Court recalled in *Boys Markets* when it overruled *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962),

> *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

398 U.S. at 241, quoting *Helvering* v. *Hallock,* 309 U.S. 106, 119 (1940) (Frankfurter, J.); *accord, Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 47-48, 58 n.30 (1977).

The Court has been especially sensitive to the need to harmonize the scope of Norris-LaGuardia's prohibition against injunctions with subsequently enacted federal labor-relations statutes. Thus, this Court did not hesitate in *Boys Markets* to overrule *Sinclair,* even though it had been decided only eight years earlier, because *Sinclair* frustrated sound national labor policy. 398 U.S. at 241. Six years after that, the Court retreated by significantly limiting *Boys Markets* in its five-to-four decision in *Buffalo Forge.* Already this term, the Court has heard argument in a case involving the limits placed on Norris-

---

[4] Respondents also assert that *Buffalo Forge* was later "reaffirmed . . . following plenary consideration" in *Jacksonville.* (Resp. at 9) Just the opposite is true. *Jacksonville* focused on an entirely different issue, and the Court simply declined an invitation to reconsider *Buffalo Forge* in a brief footnote, without any comment on the arguments presented. *Jacksonville,* 457 U.S. at 723 n.23. The issues and arguments Morrell raised in its petition have thus never been addressed by this Court, let alone given "plenary" consideration.

LaGuardia's prohibition on injunctions by the Railway Labor Act. *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employees, argued Feb. 23, 1987,* 55 U.S.L.W. 3552 (U.S. Feb. 17, 1987) (No. 86-39). This case presents a similar opportunity to clarify Norris-LaGuardia's scope, here in actions involving section 301 of the Labor Management Relations Act.

The need for a comprehensive reexamination of *Buffalo Forge* is confirmed by the apparent uncertainty of several Justices on the issue. Experience since *Buffalo Forge* evidently persuaded former Chief Justice Burger to break ranks with the *Buffalo Forge* majority and join the dissenters in *Jacksonville,* urging that the doctrine be overruled because it is based on "mechanical and contradictory analyses." 457 U.S. at 729 (Burger, J., dissenting). By contrast, Justice Brennan, who dissented in *Buffalo Forge,* joined the majority in *Jacksonville,* although his reason for doing so was left unstated. Justice O'Connor, who became a member of the Court after *Buffalo Forge,* concurred specially in *Jacksonville* because she believed that the majority's conclusion was inescapable "[u]nless the Court is willing to overrule *Buffalo Forge.*" 457 U.S. at 724 (O'Connor, J., concurring). Under these circumstances, strict adherence to *stare decisis* is both unnecessary and wrong.

Apart from urging wooden application of *stare decisis,* respondents briefly challenge only isolated portions of Morrell's petition. (*See* Resp. at 10-12) For example, respondents claim that *Buffalo Forge* can be readily applied using what they call "certain easily-ascertained hallmarks of *almost* every sympathy strike." (Resp. at 11) (emphasis added) But respondents' qualification concedes that the "hallmarks" they recommend are not useful in close cases such as this where the international union orchestrated a strike by a local union from one Morrell plant against Morrell at another plant to try to do indirectly what it clearly would have been enjoined from doing directly. (*See* Pet. at 15-17, 19-20) The courts below evidently did not

find this issue to be an easy one, reaching opposite conclusions based on the same evidence.[5]

In sum, respondents are wholly unable to defend *Buffalo Forge's* adverse effect on the important national labor policies recognized in *Boys Markets*. Those untoward effects are most graphically demonstrated by how *Buffalo Forge* has given respondents an incentive to mislead this Court and the courts below concerning respondents' position on arbitration. As respondents concede, they initially sought to arbitrate the scope of the no-strike clause by filing a grievance against Morrell. (Resp. at 3) They asserted this pending grievance as a basis for denying the injunction in both the district court and court of appeals, ultimately convincing the Eighth Circuit that an injunction was unnecessary largely because the unions had "sought, not avoided, arbitration of the grievance." (A-7, 804 F.2d at 460. *See also* Pet. at 6 n.3, 21-22.) Then, as respondents again concede, they did a sudden about-face, successfully opposing Morrell's request for arbitration of the scope of the no-strike clause at the district court level. (Resp. at 4-5 n.3)

---

[5] Respondents' claim that *Buffalo Forge* does not discourage arbitration is similarly unpersuasive. First, their argument is directed only to the effect on employers' willingness to agree to arbitration clauses and ignores the decision's broader adverse impact on the national policy favoring effective arbitration to resolve labor disputes. (Resp. at 11) That adverse effect is well-illustrated here. Second, with respect to the effect on employers' willingness to submit to arbitration, respondents ignore *Boys Markets'* observation that any incentive for employers to agree to submit disputes to arbitration is "*necessarily* dissipated" if injunctions are unavailable. 398 U.S. at 248 (emphasis added). The two isolated surveys ten years apart cited by respondents do not support a contrary conclusion. Indeed, both warn that "[c]aution. . .should be exercised in the comparison of figures in any current study with figures from a previous study." *See* BNA, *Basic Patterns in Union Contracts* at xii (11th ed. 1986); BNA, *Basic Patterns in Union Contracts* at 2 (8th ed. 1975).

Having succeeded in avoiding prompt resolution of their no-strike obligation by defeating both Morrell's motion for a preliminary injunction and its petition to compel arbitration, respondents incredibly tell this Court that Morrell has "stymied" their efforts to resolve the issue in the initial grievance steps. (*Id.* at 3)

Respondents have engaged in an elaborate shell game with the parties' arbitration clause. As a result, Morrell has been left with no meaningful way to enforce the no-strike clause, and the parties' agreement to arbitrate has been emasculated. If the unions seriously wanted to resolve the scope of the no-strike clause through arbitration, they could have done so long ago. The reason they are not proceeding with arbitration has nothing to do with Morrell, and everything to do with the disincentives created by *Buffalo Forge*.

Conclusion

This case presents this Court with a unique opportunity to correct what has proved to be a mistake and to restore the appropriate balance between the Norris-LaGuardia and Labor Management Relations Acts. For these reasons, Morrell respectfully submits that the petition should be granted.

GEORGE A. JOSEPH
(Counsel of Record)
MICHAEL P. FORADAS
CHAIM T. KIFFEL
KATHERINE C. GRADY
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2274

Of Counsel:
RAYMOND W. GASS
MIGUEL F. UGARTE
JOHN MORRELL & CO.
191 Waukegan Road
Northfield, Illinois 60093

LAWRENCE I. KIPPERMAN
JEAN F. HOLLOWAY
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7471

Dated: April 1, 1987